Supreme Court, U.S.
FILED
941048 DEC 9 1994
OFFICE OF THE CLERK

No. 94-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

NATIONAL FOOTBALL LEAGUE, *et al.*,
Petitioners,

v.

WILLIAM H. SULLIVAN, JR.,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

---

PETITION FOR A WRIT OF CERTIORARI

JOHN VANDERSTAR *
SONYA D. WINNER
THOMAS O. BARNETT
ETHAN M. POSNER

COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 662-5540
Attorneys for Petitioners

* Counsel of Record

December 1994

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

89 pp

QUESTIONS PRESENTED

The decision below presents the Court with an excellent opportunity to provide guidance on two important antitrust issues that have divided courts and scholars and that have far-reaching implications for joint ventures:

1. Where a restraint is concededly ancillary to a lawful joint venture agreement, did the court of appeals err in evaluating the restraint under a "least restrictive alternative" test rather than under a standard of reasonableness?

2. Where a joint venture, such as a professional sports league, is formed to produce a product that none of its members can produce alone, should the venture be treated as a single economic enterprise for purposes of the Sherman Act?

PARTIES TO THE PROCEEDING

Petitioners, who were defendants below, are the National Football League and twenty-one of its twenty-eight member clubs.* Respondent-plaintiff is William H. Sullivan, Jr.

---

* Petitioner-defendant members of the National Football League own NFL franchises in the following cities and areas: Atlanta (The Five Smiths, Inc.), Buffalo (Buffalo Bills, Inc.), Chicago (Chicago Bears Football Club, Inc.), Cincinnati (Cincinnati Bengals, Inc.), Cleveland (Cleveland Browns, Inc.), Dallas (Dallas Cowboys Football Club, Ltd.), Denver (PDB Sports Ltd.), Detroit (The Detroit Lions, Inc.), Green Bay (Green Bay Packers, Inc.), Houston (Houston Oilers, Inc.), Indianapolis (Indianapolis Colts, Inc.), Los Angeles (Rams) (Los Angeles Rams Football Co.), Minneapolis (Minnesota Vikings Football Club, Inc.), New Orleans (New Orleans Saints, Ltd.), New York (Jets) (New York Jets Football Club, Inc.), Phoenix (B&B Holdings, Inc.), Pittsburgh (Pittsburgh Steelers Sports, Inc.), San Diego (Chargers Football Co.), Seattle (Seattle Professional Football Club, Inc.), Tampa Bay (Tampa Bay Area NFL Football, Inc.), and Washington, D.C. (Pro-Football, Inc.).

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	7
I. THE FIRST CIRCUIT'S USE OF A "LEAST RESTRICTIVE ALTERNATIVE" REQUIREMENT IS ERROR AND CONFLICTS WITH ANCILLARY-RESTRAINT DECISIONS IN OTHER CIRCUITS	11
II. THE FIRST CIRCUIT'S REFUSAL TO RULE THAT A JOINT VENTURE WHOSE MEMBERS ARE FINANCIALLY INTERDEPENDENT IS A SINGLE ENTERPRISE UNDER SECTION 1 EXALTS FORM OVER ECONOMIC REALITY AND CONFLICTS WITH THE EIGHTH CIRCUIT	17
CONCLUSION	24
APPENDIX A	1a
APPENDIX B	44a
APPENDIX C	49a
APPENDIX D	51a
APPENDIX E	53a
APPENDIX F	55a

TABLE OF AUTHORITIES

Cases: Page

Addyston Pipe and Steel Co. v. United States, 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899) 10, 11

American Motor Inns, Inc. v. *Holiday Inns, Inc.*, 521 F.2d 1230 (3d Cir. 1975), *cert. denied*, 455 U.S. 1019 (1982) 14

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 9

Arizona v. *Maricopa County Medical Soc.*, 457 U.S. 332 (1982) 7

Broadcast Music, Inc. v. *Columbia Broadcasting Sys. Inc.*, 441 U.S. 1 (1979) 11, 15, 20

Broadcast Music, Inc. v. *Moor-Law, Inc.*, 527 F. Supp. 758 (D. Del. 1981) 14

Brown v. *Pro-Football, Inc.*, 821 F. Supp. 20 (D.D.C. 1993) 8

Business Elec. Corp. v. *Sharp Elec. Corp.*, 485 U.S. 717 (1988) 9

Catalano, Inc. v. *Target Sales, Inc.*, 446 U.S. 643 (1980) 7

Celotex Corp. v. *Catrett*, 477 U.S. 317 (1986) 9

Chan v. *Korean Air Lines Ltd.*, 490 U.S. 122 (1989) 7

Chicago Professional Sports Ltd. Partnership v. *National Basketball Ass'n*, 961 F.2d 667 (7th Cir.), *cert. denied*, 113 S. Ct. 409 (1992) 8, 10, 13, 20

City of Mount Pleasant v. *Associated Elec. Coop., Inc.*, 838 F.2d 268 (8th Cir. 1988) 6, 10, 18, 19

Continental T.V., Inc. v. *GTE Sylvania Inc.*, 433 U.S. 36 (1977) 11, 16

Copper Liquor, Inc. v. *Adolph Coors Co.*, 506 F.2d 934 (5th Cir.), *reh'g denied*, 509 F.2d 758 (1975) 13

Copperweld Corp. v. *Independence Tube Corp.*, 467 U.S. 752 (1984) 6, 17, 18, 22, 23

Denver Rockets v. *All-Pro Management, Inc.*, 325 F. Supp. 1049 (C.D. Cal. 1971) 13

Eastman Kodak Co. v. *Image Technical Services, Inc.*, 504 U.S. ——, 112 S. Ct. 2072 (1992) 7

TABLE OF AUTHORITIES—Continued

Page

Fishman v. *Estate of Wirtz*, 807 F.2d 520 (7th Cir. 1986) 20

Hartford Fire Ins. Co. v. *California*, —— U.S. ——, 113 S. Ct. 2891 (1993) 7

Image Technical Service, Inc. v. *Eastman Kodak Co.*, 903 F.2d 612 (9th Cir. 1990), *aff'd*, 112 S. Ct. 2072 (1992) 13

Independent Entertainment Group v. *National Basketball Ass'n*, 853 F. Supp. 333 (C.D. Cal. 1994) 8

Kansas v. *Utilicorp United, Inc.*, 497 U.S. 199 (1990) 7

Los Angeles Memorial Coliseum Comm'n v. *National Football League*, 726 F.2d 1381 (9th Cir.), *cert. denied*, 469 U.S. 990 (1984) 22

Matsushita Elec. Indus. Co. v. *Zenith Radio Corp.*, 475 U.S. 574 (1986) 7, 9

Murray v. *National Football League*, No. 94 CIV 5771 (E.D. Pa. September 30, 1994) 8

NCAA v. *Board of Regents*, 468 U.S. 85 (1984) 11, 15, 20

National Bancard Corp. v. *VISA, U.S.A., Inc.*, 596 F. Supp. 1231 (S.D. Fla. 1984), *aff'd*, 779 F.2d 592 (11th Cir.), *cert. denied*, 479 U.S. 923 (1986) 14

National Basketball Association v. *Williams*, 857 F. Supp. 1069 (S.D.N.Y. 1994) 8

National Football League v. *North American Soccer League*, 459 U.S. 1074 (1982) 3, 9, 13

North American Soccer League v. *National Football League*, 670 F.2d 1249 (2d Cir.), *cert. denied*, 459 U.S. 1074 (1982) 12, 18, 22

Northwest Wholesale Stationers, Inc. v. *Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985) 11, 15

Piazza v. *Major League Baseball*, 831 F. Supp. 420 (E.D. Pa. 1993) 8

Rothery Storage & Van Co. v. *Atlas Van Lines, Inc.*, 792 F.2d 210 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1033 (1987) 13, 14, 21

SCFC ILC, Inc. v. *Visa U.S.A. Inc.*, 36 F.3d 958 (10th Cir. 1994) 6, 14, 15

TABLE OF AUTHORITIES—Continued

Page

Siegal v. *Chicken Delight, Inc.*, 448 F.2d 43 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972) 13
Standard Oil Co. v. *United States*, 221 U.S. 1 (1911) 11
Sunkist Growers, Inc. v. *Winckler & Smith Citrus Products Co.*, 370 U.S. 19 (1962) 19, 23
United States v. *Citizens & Southern National Bank*, 422 U.S. 86 (1975) 19
United States v. *Realty Multi-List, Inc.*, 629 F.2d 1351 (5th Cir. 1980) 13
VKK Corp. v. *National Football League*, No. 94 CIV 8335 (S.D.N.Y. November 16, 1994) 8
White v. *National Football League*, 822 F. Supp. 1389 (D. Minn. 1993), *aff'd*, 1994 U.S. App. LEXIS —— (8th Cir. December 6, 1994) 8
Williams v. *Nevada*, 999 F.2d 445 (9th Cir. 1993) .. 17
Williams v. *Nevada*, 794 F. Supp. 1026 (D. Nev. 1992), *aff'd*, 999 F.2d 445 (9th Cir. 1993) 17

STATUTES

15 U.S.C. § 1 .... 2, 5
15 U.S.C. § 2 22

MISCELLANEOUS

VII PHILIP E. AREEDA, ANTITRUST LAW (1986) .. 7, 22, 23
ROBERT BORK, THE ANTITRUST PARADOX (1978) 12
Lee Goldman, *Sports, Antitrust, and the Single Entity Theory*, 63 Tulane L. Rev. 751 (1989) 21
Myron C. Grauer, *Recognition of the National Football League as a Single Entity Under Section 1 of the Sherman Act: Implications of the Consumer Welfare Model*, 82 Mich. L. Rev. 1 (1983) 21
Katherine R. Harrigan, *Managing for Joint Venture Success* 47 (1986) 4
James R. Houghton, *Corning Cultivates Joint Ventures That Endure*, 18 Plan. Rev., Sept./Oct. 1990 at 15 4

TABLE OF AUTHORITIES—Continued

Page

Daniel E. Lazaroff, *The Antitrust Implications of Franchise Relocation Restrictions In Professional Sports*, 53 Fordham L. Rev. 157 (1984) 21

Christian M. McBurney, *The Legality of Sports Leagues' Restrictive Admissions Practices*, 60 N.Y.U.L. Rev. 925 (1985) 21

J. Paul McGrath, "Text of Remarks At the 18th Annual New England Antitrust Conference," [1984-1986 Transfer Binder] TRADE REG. REP. (CCH) ¶ 50,470 (Nov. 12, 1984) 7

Eric Pelander & Mark Hauser, *Joint Ventures: Pulling the Right Pair from the Pile*, 12 Corp. Cashflow, July 1991 at 24 4

J. Weistart, *League Control of Market Opportunities: A Perspective on Competition and Cooperation in the Sports Industry*, 1984 Duke L.J. 1013 ..... 20, 21

"Statements of Enforcement Policy and Analytical Principles Relating to Health Care and Antitrust," U.S. Department of Justice and Federal Trade Commission (September 27, 1994), [July-Dec.] ANTITRUST & TRADE REG. REP. (BNA) No. 1682 (Special Supp.) (September 29, 1994) .. 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-

NATIONAL FOOTBALL LEAGUE, *et al.*,
Petitioners,

v.

WILLIAM H. SULLIVAN, JR.,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

---

PETITION FOR A WRIT OF CERTIORARI

The National Football League and those of its member clubs named as parties to this action petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 34 F.3d 1091 and appears in Appendix A hereto. The decision of the district court denying the motion to dismiss is reported at 795 F. Supp. 56 and appears in Appendix B hereto. The decisions of the district court denying the motion for summary judgment, directed verdict, and judgment as a matter of law appear in Appendices C, D, and E respectively.

JURISDICTION

The judgment of the court of appeals is dated September 16, 1994. A petition for rehearing was timely filed on September 30, 1994, and was denied on October 26, 1994, in an order that made changes to the court's original opinion. *See* Appendix F. The jurisdiction of this Court exists pursuant to 28 U.S.C. § 1254(1). Jurisdiction in the district court was founded upon 28 U.S.C. §§ 1331 and 1337.

STATUTE INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

STATEMENT OF THE CASE

The two legal issues in this case are important to the correct application of the antitrust laws to sports leagues and other joint ventures. A serious rift between the Circuits has emerged on these issues. The first issue concerns restraints that further the goals of legitimate joint ventures: Some Circuits hold that such restraints must be the "least restrictive alternative" way to accomplish the venture's goals, while others reject this approach and require only a reasonable relationship between the restraints and the venture's goals. The second issue relates to the degree of economic integration that joint-venture participants must reach before the venture is held to be a single enterprise and thus outside the conspiracy framework of Section 1 of the Sherman Act: The court below denied such treatment because of evidence from which, in its view, a jury could find that the joint venturers "compete" in a way that could not have occurred if there had been no joint venture, whereas another Circuit holds

that a joint venture is a single enterprise so long as the co-venturers are interdependent in the production of the joint product. This Court's intervention is necessary to clear up these conflicts and to provide a coherent analytical framework for the guidance of both entrepreneurs and lower courts.

Respondent brought this antitrust suit against the National Football League ("NFL") and a number of member clubs. He challenged the NFL's policy on public ownership of member clubs.

As Chief Justice Rehnquist has succinctly described the NFL:

> "The NFL owners are joint venturers who produce a product, professional football, which competes with other sports and other forms of entertainment in the entertainment market."

National Football League v. *North American Soccer League*, 459 U.S. 1074, 1077 (1982) (Rehnquist, J., dissenting from denial of certiorari).

It is beyond dispute that the product which the NFL produces could not be produced by any of its members acting alone. It is also plain that the League could not function effectively without agreement among its members on a wide variety of subjects. For example, a great deal of the revenue received by members of the NFL is shared equally or nearly equally.[1] It is the members' business judgment that practices like revenue sharing help to promote playing-field parity among teams, thus maximizing the number of exciting contests and championship races in which the outcome is in doubt until the very end. There

---

[1] All network television revenue, which comprises roughly two-thirds of all revenue of the clubs, is shared equally, as is all revenue from licensing of individual team logos, nicknames, etc. Revenue from ticket sales is shared, after deducting certain expenses, with the "home team" receiving 60 per cent and the "visiting team" receiving 40 per cent.

is no reason to doubt that business judgments such as these are sound.[2]

The areas of agreement among NFL members include the core structure and operation of the League itself, such as rules and policies that address qualifications for membership. One such policy is the "public ownership policy" at issue here. The members of the NFL have determined that they can most effectively present the joint venture's entertainment product if none of the member clubs is publicly owned. It is their business judgment that they are better able to make decisions which are in the best interests of the joint enterprise—the NFL—if the members are not required to answer to public shareholders' short-term dividend interests.[3]

The court of appeals in this case agreed that this justification for the NFL's public ownership policy is sound and that the policy enhances the League's ability to produce its joint product:

> "[W]e accept the NFL's claim that its public ownership policy contributes to the ability of the NFL to

---

[2] It is undeniable that the NFL has been a success. For example, the NFL's championship game, the "Super Bowl," regularly draws a larger audience than any other television program, and the ABC telecast of "Monday Night Football" is one of the longest running successes in the history of the medium.

[3] In addition, if member clubs had public shareholders, the ability of the members acting collectively to select their co-members would be substantially undermined; the business literature recognizes that this ability is a critical element in successful joint enterprises. *See, e.g.*, Katherine R. Harrigan, *Managing for Joint Venture Success* 47 (1986) ("Successful joint ventures require the correct choice of partners and symmetrical partner outlooks . . . ."); James R. Houghton, *Corning Cultivates Joint Ventures That Endure*, 18 Plan. Rev., Sept./Oct. 1990, at 15, 17 (listing among key criteria for successful joint ventures compatible strategy and culture, compatible strengths, and no conflict of interests); Eric Pelander & Mark Hauser, *Joint Ventures: Pulling the Right Pair from the Pile*, 12 Corp. Cashflow, July 1991, at 24, 31 ("The key to success is strategic compatibility, the ways in which the strengths, weaknesses and goals of the partners fit.").

> function as an effective sports league, and that *the NFL's functioning would be impaired if publicly owned teams were permitted*, because the short-term dividend interests of a club's shareholder would often conflict with the long-term interests of the league as a whole. That is, *the policy avoids a detrimental conflict of interests between team shareholders and the league.*"

34 F.3d at 1102; Pet. App. 18a (emphasis added).

Respondent owned an NFL club (the New England Patriots). He encountered significant financial difficulties in the 1980s and sold the Patriots in 1988 to a limited partnership to help pay his substantial debts. In this lawsuit he claimed that he would have preferred to sell 49 per cent of the club to the public, paying his debts with the proceeds while retaining a majority ownership interest. He claimed that the NFL, through application of its public ownership policy, prevented this public sale and thus caused him to lose his ownership interest altogether. He alleged that the NFL policy was a "contract, combination or conspiracy" in restraint of trade and thus a violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

After the district court denied motions to dismiss and for summary judgment, the case was tried to a jury. The jury rendered a verdict for respondent. The district court, after reducing the amount, entered final judgment for $51 million. The NFL's post-trial motions were denied.

The court of appeals rejected petitioners' arguments that they were entitled to judgment as a matter of law. In the parts of its opinion that are relevant here, the court made two rulings:

1. Petitioners argued that, because the product of the NFL joint venture could not have been produced by any member alone, the members are interdependent and function as a single enterprise with respect to determination of membership. Thus, petitioners contended, they do not

come within Section 1, which applies only to actions of multiple entities. Petitioners relied on *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752 (1984), for the principle that economic realities and not legal form should control in antitrust cases, and *City of Mount Pleasant* v. *Associated Elec. Coop., Inc.*, 838 F.2d 268 (8th Cir. 1988) (R. Arnold, J.), which held that a joint venture whose members, though separate entities, were financially interdependent was a single entity for purposes of Section 1. The court below rejected this argument.

2. Petitioners also argued that the NFL's public ownership policy was justified as a matter of law as ancillary to a legitimate joint venture. As we note above, the court of appeals agreed that the policy was reasonably related to the NFL's legitimate objective of making decisions in furtherance of the joint product. (*See* pp. 4-5, *supra.*) Nevertheless, the court held that joint ventures are subject to the same rule-of-reason analysis that would be applied to any combination of separate interests and, in addition, that a "least restrictive alternative" analysis should be applied. Thus, the court said, the jury was free to find the policy unlawful because there was evidence that the NFL's objectives might be achieved by a method that was less restrictive of the "competition" between owners for the sale of ownership interests in NFL clubs. Petitioners sought rehearing on this point and called to the court's attention the intervening decision in *SCFC ILC, Inc.* v. *Visa U.S.A. Inc.*, 36 F.3d 958 (10th Cir. 1994), which had adopted a wholly different approach. Although the court made some changes in its opinion, it denied rehearing. (*See* Appendix F.)[4]

While the court of appeals refused to direct judgment as a matter of law for the NFL defendants, it did find

---

[4] **Appendix A contains the opinion below as modified to reflect the three changes the court made in the Order denying rehearing. We note that the copy of the opinion that is published in the advance-sheet version of 34 F.3d 1091 contains only two of the three changes.**

several prejudicial errors in the trial, and it vacated the jury verdict and remanded the case for a second trial. However, this petition presents discrete threshold legal issues that were fully litigated below. Indeed, the NFL contends that the respondent's claim should never have been allowed to proceed to trial in the first—much less the second—instance.[5]

REASONS FOR GRANTING THE PETITION

The application of the antitrust laws to joint ventures, including professional sports leagues, has generated confusion and conflicts in the lower courts. As Professor Areeda has warned, specifically in the context of sports leagues: "The inherent openness of [the current joint venture analysis] often leads judges and juries to venture beyond competition and into management discretion." VII PHILIP E. AREEDA, ANTITRUST LAW ¶ 1478d at 359 (1986).[6] This case affords the Court an opportunity, on a well developed record, to provide a coherent analytical framework in an area in which litigation has been widespread and is likely to continue to burden the courts.

---

[5] It is not uncommon for the Court to grant certiorari to review decisions in appropriate cases where the decision below, if left standing, would result in a trial. *See, e.g., Hartford Fire Ins. Co.* v. *California*, —— U.S. ——, 113 S. Ct. 2891, 2900 (1993); *Eastman Kodak Co.* v. *Image Technical Services, Inc.*, 504 U.S. ——, 112 S. Ct. 2072, 2076 (1992); *Kansas* v. *Utilicorp United, Inc.*, 497 U.S. 199, 204-06 (1990); *Chan* v. *Korean Air Lines Ltd.*, 490 U.S. 122, 124-25 (1989); *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 580-82 (1986); *Arizona* v. *Maricopa County Medical Soc.*, 457 U.S. 332, 335-36 (1982); *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. 643, 644 (1980).

[6] The lack of a coherent analytical framework led one head of the Antitrust Division to state that "some executives view antitrust policy toward joint ventures in much the same fashion as Sir Winston Churchill viewed the Soviet Union—'a mystery shrouded in a riddle wrapped in an enigma.'" J. Paul McGrath, "Text of Remarks At the 18th Annual New England Antitrust Conference," [1984-1986 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 50,470, at 56,137 (Nov. 12, 1984).

The kind of business transaction that poses the issues presented here can be readily described: Several business entities form a joint venture in order to produce a product or service that none of them could produce alone. If the product or service is well received in the marketplace, consumers benefit, the economy grows, and the entrepreneurs are rewarded by profits. However, the agreement by which the joint venture is created and operated will inevitably contain terms that would, in any other context, be open to challenge under the antitrust laws. Because these terms are by definition part of an agreement between formally separate entities, they particularly invite challenge as "conspiracies in restraint of trade" under Section 1 of the Sherman Act.

Illustrative of the problem have been the many antitrust cases filed against professional sports leagues, joint ventures of interdependent business entities that require an array of restraints to function at all.[7] The decision

---

[7] For example, three different lawsuits have been filed against the NFL as a result of a change in ownership of a single club, the New England Patriots. In addition to this case, the two individuals who bought the club from respondent have sued (in two different circuits), claiming that one or another NFL rule or policy has also caused them injury under the antitrust laws. *See VKK Corp.* v. *National Football League,* No. 94 CIV 8335 (S.D.N.Y. November 16, 1994); *Murray* v. *National Football League,* No. 94 CIV 5771 (E.D. Pa. September 30, 1994).

Other antitrust cases presently pending that involve professional sports leagues include *Chicago Professional Sports Ltd. Partnership* v. *National Basketball Ass'n,* 961 F.2d 667 (7th Cir.) (remanding for further proceedings), *cert. denied,* 113 S. Ct. 409 (1992); *National Basketball Ass'n* v. *Williams,* 857 F. Supp. 1069 (S.D.N.Y. 1994) (appeal pending); *Independent Entertainment Group* v. *National Basketball Ass'n,* 853 F. Supp. 333 (C.D. Cal. 1994) (appeal pending); *White* v. *National Football League,* 822 F. Supp. 1389 (D. Minn. 1993), *aff'd,* 1994 U.S. App. LEXIS —— (8th Cir. December 6, 1994); *Brown* v. *Pro-Football, Inc.,* 821 F. Supp. 20 (D.D.C. 1993) (appeal pending). In addition, *Piazza* v. *Major League Baseball,* 831 F. Supp. 420 (E.D. Pa. 1993), has been settled very recently, and seven cases against the NFL have been stayed pending the appeal in *White.*

in this case is typical of the "excessive speculation" and confused analysis that then-Justice Rehnquist sought to address twelve years ago in *National Football League* v. *North American Soccer League*, 459 U.S. 1074 (1982) (Rehnquist, J., dissenting from the denial of certiorari).

This petition presents for decision the quesiton of how to evaluate under Section 1 restraints that relate to the joint operation and governance of professional sports leagues and other joint ventures. The result of the decision in this case by the First Circuit, if not corrected, leaves many such restraints open to challenge in treble-damage trials even when they enhance efficiency and thus promote the interests of consumers.

Bringing greater certainty to this important area of antitrust law would help the development of beneficial business activities by letting entrepreneurs know when they can safely invest their dollars and their talents in joint ventures for the production of new products. Greater certainty will also reduce unnecessary costs of litigation in the federal courts. In language equally applicable here, Justice Scalia wrote for the Court that:

> "We have been solicitous to assure that the market-freeing effect of our decision in *GTE Sylvania* is not frustrated by related legal rules . . . [Otherwise, m]anufacturers would be likely to forgo legitimate and competitively useful conduct rather than risk treble damages . . . ."

Business Elec. Corp. v. *Sharp Elec. Corp.*, 485 U.S. 717, 726-28 (1988); *see also Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986); *Celotex Corp.* v. *Catrett*, 477 U.S. 317 (1986); *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

Petitioner's precise argument in this case is that, where entrepreneurs jointly create a useful product that would not otherwise be available, the antitrust laws afford them freedom to exercise their business judgment when they determine the most efficient and effective structure for the venture, including selection of the participants.

Doctrinally, petitioners' position can be articulated in either of two ways, as we will show in detail below.

First, the restraint at issue here falls squarely within Judge Taft's concept of being "merely ancillary to the main purpose of a lawful contract," *Addyston Pipe and Steel Co.* v. *United States*, 85 F. 271, 282 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899), and should have been upheld on that basis. The court below held, however, that even when the restraint is ancillary to a lawful joint venture, it nevertheless must also be the "least restrictive means" to accomplish the joint venturers' goals—an interpretation that is followed by some Circuits but rejected by others. Under this approach, juries are asked to make business judgments about how best to structure and operate a joint venture rather than factual decisions about injury to competition.[8]

Second, a joint venture such as a professional sports league, which produces a product no individual participant could produce on its own, should be treated as a single enterprise with regard to decisions about its joint operation and governance. This is "a subject that has divided courts and scholars for some years," *Chicago Professional Sports Ltd. Partnership* v. *National Basketball Ass'n*, 961 F.2d 667, 672 (7th Cir.) (Easterbrook, J.), *cert. denied*, 113 S. Ct. 409 (1992); *see City of Mount Pleasant* v. *Associated Elec. Coop., Inc.*, 838 F.2d 268 (8th Cir. 1988) (R. Arnold, J.). Treating a joint venture agreement as an agreement among compet-

---

[8] Although some courts, including the First Circuit in this case, refer to a *less* restrictive alternative, in fact the standard being applied is the *least* restrictive alternative. An example will show why: If the NFL were now to adopt the policy which the court below believes might be *less* restrictive than the current policy, a plaintiff could challenge that policy in another case and would reach the jury if there were yet another policy that appeared to be even less restrtictive. Thus, a defendant could be safe from antitrust challenge only if it adopted a policy that everyone would agree is the *least* restrictive alternative available.

itors, and thus subject to Section 1, exalts legal form over economic reality, contrary to the *Copperweld* principle.

I. THE FIRST CIRCUIT'S USE OF A "LEAST RESTRICTIVE ALTERNATIVE" REQUIREMENT IS ERROR AND CONFLICTS WITH ANCILLARY-RESTRAINT DECISIONS IN OTHER CIRCUITS.

The Court has recognized since the early days of the Sherman Act that only contracts that *unreasonably* restrain trade violate Section 1.[9] Every contract literally restrains trade, but a contract is nonetheless lawful under Section 1 if it has a legitimate purpose and effect. Thus, Judge Taft correctly recognized that a covenant not to compete enhances competition if it is "merely ancillary" to the main purpose of a lawful contract, such as the sale of a business. *Addyston Pipe and Steel Co.* v. *United States, supra.* Indeed, the Court has repeatedly recognized that restrictions in one area may enhance competition in other areas and thereby be procompetitive. *See Northwest Wholesale Stationers, Inc.* v. *Pacific Stationery & Printing Co.*, 472 U.S. 284, 295-96 (1985); *NCAA* v. *Board of Regents*, 468 U.S. 85, 102 (1984); *Broadcast Music, Inc.* v. *Columbia Broadcasting Sys., Inc.*, 441 U.S. 1, 18-23 (1979); *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 51-57 (1977).

Although the "ancillary restraints doctrine" can be applied in many contexts, it readily lends itself to evaluation of joint ventures under the antitrust laws. Joint ventures require the integration of economic resources between two or more parties to produce a product or service.[10] Accomplishing the integration efficiently and effec-

---

[9] *See Standard Oil Co.* v. *United States*, 221 U.S. 1 (1911).

[10] It would be difficult to find a better example than the NFL of the type of venture that provides benefits to consumers and requires the cooperation among the participants, not just to make the product more efficiently, but to make the product at all. No single

tively invariably requires a series of provisions by which the venturers commit appropriate resources to the venture and avoid taking actions that, in their business judgment, would undermine it. Because a lawful joint venture furthers the interests of consumers, and therefore the goals of the antitrust laws, such provisions should be upheld against a Section 1 challenge unless there are sound reasons to reach a different result in a particular case.

The Circuits are split, however, in determining when this presumption of lawfulness is overcome.

Some Circuits, including the First Circuit in this case, have applied a very stringent test and have held that a restraint is not lawful as an ancillary restraint unless it is absolutely necessary, *i.e.*, the least restrictive means possible to achieve a legitimate purpose of the joint venture. Another example is the Second Circuit's decision in *North American Soccer League* v. *National Football League*, 670 F.2d 1249, 1261 (2d Cir.), *cert. denied*, 459 U.S. 1074 (1982), where the court said

> ". . . the NFL was required to come forward with proof that any legitimate purpose could not be achieved through less restrictive means. This it has failed to do."

This decision was criticized by then-Justice Rehnquist, who said that the court of appeals had gone

---

club could produce the professional football entertainment product and the corresponding benefit to consumers. Judge Bork has made the point well:

> "Some activities can only be carried out jointly. Perhaps the leading example is league sports. When a league of professional lacrosse teams is formed, it would be pointless to declare their cooperation illegal on the ground that there are no other professional lacrosse teams."

ROBERT BORK, THE ANTITRUST PARADOX 278 (1978), quoted in *NCAA*, 468 U.S. at 101.

> "too far by adopting the least restrictive alternative analysis that is sometimes used in constitutional law. The antitrust laws impose a standard of reasonableness not a standard of absolute necessity."

459 U.S. at 1079 (Rehnquist, J., dissenting from denial of certiorari).[11]

Other Circuits, in contrast, define a restraint as ancillary if it "serves to make the main transaction more effective in accomplishing its purpose." *Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc.*, 792 F.2d 210, 224 (D.C. Cir. 1986) (Bork, J.), *cert. denied*, 479 U.S. 1033 (1987). This approach rejects the "least restrictive alternative" analysis and requires only that the restraint be reasonably related to the joint venture's lawful purpose. As Judge Bork explained in *Rothery*, "If the underlying contract integration is lawful . . . restraints ancillary to the integration . . . should be lawful." 792 F.2d

---

[11] Other Circuits that apply the "least restrictive alternative" test in the ancillary-restraint context, or in other situations in which restraints are sought to be justified as pro-competitive, include

- the Seventh, *Chicago Professional Sports Ltd. Partnership* v. *National Basketball Ass'n*, 961 F.2d 667, 675-76 (7th Cir.) (affirming judgment against the NBA on the ground of a less restrictive alternative), *cert. denied*, 113 S. Ct. 409 (1992);
- the Fifth, *United States* v. *Realty Multi-List, Inc.*, 629 F.2d 1351, 1381-83 (5th Cir. 1980) (applying least restrictive alternative standard to trade association membership criteria); *Copper Liquor, Inc.* v. *Adolph Coors Co.*, 506 F.2d 934, 944-45 (5th Cir.) (applying "less restrictive means" test to territorial restrictions on distributors), *reh'g denied*, 509 F.2d 758 (1975); and
- the Ninth, *Image Technical Services, Inc.* v. *Eastman Kodak Co.*, 903 F.2d 612, 618-19 (9th Cir. 1990) (tying arrangement must be least restrictive means to accomplish legitimate objective), *aff'd without considering the point*, 112 S. Ct. 2072 (1992); *Siegal* v. *Chicken Delight, Inc.*, 448 F.2d 43, 51 (9th Cir. 1971) (requiring franchisor to meet "less restrictive alternatives" test), *cert. denied*, 405 U.S. 955 (1972); *Denver Rockets* v. *All-Pro Management, Inc.*, 325 F. Supp. 1049, 1065-66 (C.D. Cal. 1971).

at 230 n.11.[12] A consequence of this approach is that the participants in the joint venture, who have invested their resources and talents in it, are accorded latitude to make judgments about the most efficient way to serve the interests of consumers, rather than asking juries to "calibrate degrees of reasonable necessity" and make "judgments of degree of efficiency," 792 F.2d at 227.[13]

A recent decision by the Tenth Circuit illustrates this second approach and provides a sharp contrast to the First Circuit's decision in this case. In *SCFC ILC, Inc.* v. *Visa U.S.A. Inc.*, 36 F.3d 958 (10th Cir. 1994), a financial institution owned by Sears had sought unsuccessfully to join Visa U.S.A., a joint venture consisting of banks that issue credit cards under the VISA brand name. The

---

[12] In addition to the District of Columbia Circuit in *Rothery*, the "reasonably related" approach to evaluating ancillary restraints has been adopted by

- the Third Circuit, *American Motor Inns, Inc.* v. *Holiday Inns, Inc.*, 521 F.2d 1230, 1249 (3d Cir. 1975) (criticizing least restrictive test as requiring "[e]ntrepreneurs [to be] guarantors that the imaginations of lawyers could not conjure up some method of achieving the business purpose in question that would result in a somewhat lesser restriction of trade"), *cert. denied*, 455 U.S. 1019 (1982); *Broadcast Music, Inc.* v. *Moor-Law, Inc.*, 527 F. Supp. 758, 769 (D. Del. 1981),
- the Tenth Circuit (*see* discussion in text, *infra*),
- a district court in the Eleventh Circuit, *National Bancard Corp.* v. *VISA, U.S.A., Inc.*, 596 F. Supp. 1231, 1256-57 (S.D. Fla. 1984) ("It should be stressed . . . that . . . the relevant question is not whether the challenged practice is the . . . 'least restrictive,' but simply whether it is reasonable"), *aff'd*, 779 F.2d 592 (11th Cir.), *cert. denied*, 479 U.S. 923 (1986), and
- the federal antitrust enforcement authorities, *see* "Statements of Enforcement Policy and Analytical Principles Relating to Health Care and Antitrust," U.S. Department of Justice and Federal Trade Commission (September 27, 1994) at Section 2.B, [July-Dec.] ANTITRUST & TRADE REG. REP. (BNA) No. 1682 (Special Supp.), at S-7 (September 29, 1994).

[13] The Third Circuit made the same point in *American Motor Inns, supra.*

court of appeals reversed a jury verdict for Sears and ordered the entry of judgment for the joint venture defendant. Citing especially Judge Bork's analysis in *Rothery*, which it said was "built on the foundation of *BMI*, *NCAA*, and *Northwest Wholesale Stationers*," [14] 36 F.3d at 970, the court held that ancillary restraints that are reasonably related to the lawful purposes of a joint venture do not violate Section 1 of the Sherman Act.[15] The court expressly refused to authorize an inquiry into whether the defendant's objectives could have been achieved by other means:

> "Given Visa USA's justification . . . we are left with a vast sea of commercial policy into which Sears would have us wade. To impose liability on Visa USA for refusing to admit Sears or revise the by-law to open its membership to intersystem rivals, we think, sucks the judiciary into an economic riptide of contrived market forces. Whatever currents Sears imagines Visa USA has wrongly created, *we believe can be better corrected by the marketplace itself.*"

Id. at 972 (emphasis added).

The Tenth Circuit thus recognized and avoided the dangers inherent in a least-restrictive-alternatives analysis. In contrast, the court below in this case invited meritless lawsuits and adopted a prescription for endless litigation, allowing a plaintiff to go to the jury on a Section 1 charge against *any* aspect of a joint venture so long as there was some evidence, however speculative, of a "less restrictive" means of accomplishing the venture's goals. The facts of this case well illustrate this point. The NFL's

---

[14] Referring to *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979); *NCAA* v. *Board of Regents*, 468 U.S. 85 (1984); and *Northwest Wholesale Stationers, Inc.* v. *Pacific Stationary & Printing Co.*, 472 U.S. 284 (1985).

[15] As noted above (p. 6), the *Visa* case was decided shortly after the original decision in this case. Petitioners called the decision to the attention of the court below in their petition for rehearing, but the court denied the petition after making changes in its opinion.

policy is opposed to public ownership of any interest in a member club. The court below held that permitting a public sale of a minority interest, in the form of nonvoting stock, would be less restrictive than the NFL's current policy and that it "may yield the same benefits as the current policy."[16] Yet the proof of the benefits of the NFL's policy—that it "avoids a detrimental conflict of interests between team shareholders and the league," 34 F.3d at 1102, Pet. App. 4a-5a—arose in just such a situation: minority shareholders who held nonvoting stock.[17] It is thus obvious that the "least restrictive alternative" test employed by the First Circuit would permit treble damages verdicts to be based on the sheerest kind of speculation.

This Court has not addressed the "least restrictive alternative" issue since *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36 (1977), in which the Court noted that a restraint could be reasonable even though it "was neither the least nor the most restrictive provision that it could have used," *id.* at 58 n.29. It is obvious from the discussion above that lower courts have not developed a consistent analytical framework within which to analyze restraints that are ancillary to lawful joint ventures. The Court should grant the petition to resolve the conflict in the Circuits and hold that restraints that are reasonably related to a legitimate goal of a lawful joint venture do not violate Section 1 of the Sherman Act. In view of the acceptance by the court of appeals of the NFL's justification for its public ownership policy, such a test would require that judgment for petitioners be entered in this case.

---

[16] This language appears in the version of the court's opinion, Pet. App. 19a, as revised by its Order denying the petition for rehearing, *see* App. F. The language does not appear in the advance sheet version of the opinion as published at 34 F.3d at 1103. The error has been called to the publisher's attention.

[17] Ex. 1233 at 1, 6; Ex. 1253 at 5-128; Ex. 1256 at 67-68; Ex. 2001 at 7-9.

II. THE FIRST CIRCUIT'S REFUSAL TO RULE THAT A JOINT VENTURE WHOSE MEMBERS ARE FINANCIALLY INTERDEPENDENT IS A SINGLE ENTERPRISE UNDER SECTION 1 EXALTS FORM OVER ECONOMIC REALITY AND CONFLICTS WITH THE EIGHTH CIRCUIT.

The court below committed a second error when it held that the NFL was not a single enterprise and therefore was subject to the reach of Section 1 of the Sherman Act, which applies only when there is a "contract, combination . . . or conspiracy . . . ."

Even when there are multiple parties, Section 1 applies only where an agreement among them "deprives the marketplace of the *independent* centers of decisionmaking that competition assumes and demands." *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 769 (1984) (emphasis added). In holding that a parent and its subsidiary were incapable of conspiring within the meaning of Section 1, the Court in *Copperweld* condemned the intra-enterprise conspiracy doctrine because it focused on "the form of an enterprise's structure and ignores the reality." *Id.* at 772. The Court explained that "a business enterprise should be free to structure itself in ways that serve efficiency of control, economy of operations, and other factors dictated by business judgment without increasing its exposure to antitrust liability." *Id.* at 773.[18]

---

[18] The Ninth Circuit has also held that separately owned but interdependent corporations may "comprise a 'common enterprise' under Section 1" even where the economic integration between the parties was arguably less extensive than in the NFL. *See Williams* v. *Nevada*, 999 F.2d 445, 447 (9th Cir. 1993) (affirming district court finding that fast food franchisor and franchisee were incapable of conspiring). The district court in *Williams* explained, in part, that as the franchised restaurants "prosper because of the uniformity of quality food and service, each franchise benefits from an enhanced reputation which results in an increase in business, as does the franchisor who is able to sell more franchises . . . ." 794 F. Supp. 1026, 1032 (D. Nev. 1992).

The Court has not had occasion to address this principle in the context of joint ventures, and the lower courts have followed conflicting approaches on the subject. The court of appeals in this case rejected petitioner's single-enterprise argument, but the Eighth Circuit (and perhaps the Seventh) would have reached the opposite conclusion. In addition, then-Justice Rehnquist supported the single-enterprise argument in the *North American Soccer League* case, *see* 459 U.S. at 1077 (Rehnquist, J., dissenting from the denial of certiorari).

The court below acknowledged that a joint venture such as the NFL could constitute a single enterprise if the participants "pursued the common interests of the whole rather than interests separate from those of the corporation itself." 34 F.3d at 1099 (*quoting Copperweld*, 467 U.S. at 770); Pet. App. 11a. However, the court found that the NFL member clubs "compete against each other for the sale of their ownership interests" and therefore could, in certain circumstances, pursue interests separate from the League as a whole. *Id.* The court did not seem to recognize that, if the NFL joint venture did not exist, any such "competition" could not have occurred in the first place and that the joint venture therefore did not *eliminate* any competition at all.

In contrast to the court below, the Eighth Circuit in an opinion by Chief Judge Richard Arnold, adopted the single-enterprise approach in *City of Mt. Pleasant, Iowa* v. *Assoc. Elec. Coop.*, 838 F.2d 268 (8th Cir. 1988). The defendant there was a joint venture of rural electrical cooperatives that were alleged to have discriminated against non-member municipality customers. The court affirmed the district court's finding that the defendants constituted a single enterprise incapable of conspiring within the meaning of Section 1 of the Sherman Act. The court said that "the cooperative organization is a single

enterprise pursuing a common goal." 838 F.2d at 276.[19] Moreover, the court in *City of Mt. Pleasant* held it to be irrelevant that the cooperative's members had "diverse" interests as demonstrated by internal disputes over pricing policies and the allocation of profits:

> "Even though the cooperatives may quarrel among themselves on how to divide the spoils of their economic power, it cannot reasonably be said that they are *independent sources* of that power. Their power depends, and has always depended, on the cooperation among themselves. They are interdependent, not independent. The disagreements we have described are more like those among the board members of a single enterprise, than those among enterprises which are themselves separate and independent." 838 F.2d at 277 (emphasis in the original).

Chief Judge Arnold also observed that "[i]t will always be true that separate companies, in one enterprise, that are located in separate areas and serve separate customers, will have varying interests." *Id.*

The case at bar would have been decided differently in the Eighth Circuit. The NFL is a prime example of an enterprise whose decisions should not be viewed as resulting from a "contract, combination or conspiracy" within the meaning of Section 1—at least when the decisions concern internal governance issues such as who may be members: Like the cooperatives in *City of Mount Pleasant*, the NFL clubs are "interdependent, not independent." Their economic power "depends, and has al-

---

[19] Chief Judge Arnold found support for this result in this Court's decisions in *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Prods. Co.*, 370 U.S. 19 (1962) ("the 12,000 growers here involved are in practical effect and in the contemplation of the statutes one 'organization' or 'association' even though they have formally organized themselves into three separate legal entities"), and *United States* v. *Citizens & Southern Nat'l Bank*, 422 U.S. 86 (1975) (entities with only 5 per cent common ownership nonetheless single enterprise).

ways depended, on the cooperation among themselves." Notwithstanding some variance of individual interests, the several components of the NFL share a common goal and common commitment to the success of the League as a whole. Without the NFL, the member clubs have no value, for they have no product. Their product is the structured on-field "competition" that results from the joint enterprise itself. The clubs must and do cooperate on all significant decisions involving the composition of the League as well as the character of the entertainment product itself. No club can succeed if the League does not succeed. In other words, the member clubs are plainly not "independent centers of decisionmaking" that compete to advance their own self-interests, which *Copperweld* holds must exist before Section 1 applies.[20]

The Seventh Circuit appears to take the same view on this point as the Eighth. In a case involving professional basketball, Judge Easterbrook noted "the shakiness of treating the clubs, which must cooperate to have any product to sell, as rival 'producers' in the first place"; he suggested, without deciding, that the League may be a single enterprise. *Chicago Professional Sports*, 961 F.2d at 676.[21] Several commentators also approve this position. *See* J. Weistart, *League Control of Market Oppor-*

---

[20] Neither *Broadcast Music, Inc.* v. *Columbia Broadcasting Sys., Inc.*, 441 U.S. 1 (1979), nor *National Collegiate Athletic Ass'n* v. *Board of Regents*, 468 U.S. 85 (1984), speaks to the issue addressed here. *BMI* did not address the single-enterprise issue and instead focused entirely on whether the agreement in question fell within the *per se* doctrine. As for *NCAA*, the Court specifically noted that the Association, which consists of numerous individual colleges and leagues and is far less integrated than the NFL, was *not* acting as a single entity with respect to the challenged limitations on television broadcasts. 468 U.S. at 113-14.

[21] In a related context, Judge Easterbrook has noted that where "[defendants are] under common control . . . [t]hey cannot be guilty of 'conspiring' . . . That the overlap of investment is not complete is irrelevant; 'control' is what matters for purposes of *Copperweld* . . . ." *Fishman* v. *Estate of Wirtz*, 807 F.2d 520, 576 (7th Cir. 1986) (Easterbrook, J., dissenting).

tunities: A Perspective on Competition and Cooperation in the Sports Industry, 1984 Duke L.J. 1013; Myron C. Grauer, *Recognition of the National Football League as a Single Entity Under Section 1 of the Sherman Act: Implications of the Consumer Welfare Model*, 82 Mich. L. Rev. 1 (1983).[22]

Even accepting, *arguendo*, that NFL member clubs "compete" in the sale of ownership interests, such "diversity of interests" does not alter the underlying character of the NFL as a single economic enterprise. Indeed, the First Circuit's approach would effectively read the "conspiracy" requirement out of Section 1 of the Sherman Act. The owners of *every* entity are actual or potential competitors in the sale of ownership interests. The stockholders of General Motors "compete" with one another for the sale of GM stock. The partners in a law firm "compete" to divide the profits of the partnership. Nevertheless, a policy adopted by GM restricting the sale of its stock would be a unilateral action of the corporation, not a "conspiracy" among owners, and a law firm certainly may impose restrictions on its partners without fear of Section 1 scrutiny.[23]

What the First Circuit lost sight of in this case is that economic substance, not legal structures, must guide the determination of whether a joint venture restriction eliminates an independent center of economic decisionmaking.[24] The NFL could have established itself as a single

---

[22] Other commentators disagree. *See, e.g.*, Lee Goldman, *Sports, Antitrust, and the Single Entity Theory*, 63 TULANE L. REV. 751, 761-89 (1989); Daniel E. Lazaroff, *The Antitrust Implications of Franchise Relocation Restrictions In Professional Sports*, 53 FORDHAM L. REV. 157, 164 (1984); Christian M. McBurney, *The Legality of Sports Leagues' Restrictive Admissions Practices*, 60 N.Y.U. L. REV. 925, 928-30 (1985).

[23] In *Rothery*, for example, Judge Bork noted that "fee schedules imposed by a law partnership are accepted, even taken for granted." 792 F.2d at 224 n.10.

[24] The court cited two other cases that rejected the contention that the NFL is a single enterprise within the meaning of Section

corporation and created unincorporated divisions to operate the individual teams. The club owners (who would collectively own the corporation) could have been designated as division managers. The compensation of each division manager could be set to provide the same compensation as club owners receive under the current system. This hypothetical structure could have the same set of economic incentives and impact as the current system and indisputably would qualify the NFL as a single enterprise.[25] The fact that the NFL club owners chose a different structure that may be more efficient and effective in bringing their highly successful entertainment product to market should not compel a different result.[26] "To

---

1. *See Los Angeles Memorial Coliseum Comm'n* v. *National Football League*, 726 F.2d 1381, 1389-90 (9th Cir.), *cert. denied*, 469 U.S. 990 (1984); *North American Soccer League* v. *National Football League*, 670 F.2d 1249 (2d Cir.), *cert. denied*, 459 U.S. 1074 (1982). However, these two decisions predated *Copperweld* and thus do not reflect that decision's emphasis on economic realities rather than legal form. Even so, the dissenting judge in the *Los Angeles Memorial Coliseum* case wrote that:

> "The profound interdependency of the N.F.L. and its member clubs in the daily operation and strategic marketing of professional football belies the district court's conclusion that each member club is an individual and economically meaningful competitor." 726 F.2d at 1405 (Williams, J., dissenting).

[25] The formation of the NFL would, of course, be subject to antitrust scrutiny, but the subsequent internal decisions of that entity should be considered an agreement under Section 1 (or the conspiracy component of Section 2). *Cf. Copperweld*, 467 U.S. at 777. *See also* VII PHILIP E. AREEDA, ANTITRUST LAW ¶ 1478c at 355 (1986) ("once a venture is judged to have been lawful at its inception and currently, its decisions should be regarded as those of a single entity rather than the parents' daily conspiracy on every purchase-sale-hiring-licensing choice") (footnote omitted). Moreover, the single-enterprise theory would not affect the possibility of a challenge under the monopolization and attempt-to-monopolize components of Section 2, 15 U.S.C. § 2.

[26] Professor Areeda concedes that no principled distinction can be drawn between the current system and the hypothetical posed in the text. But instead of arguing that the two situations should

hold otherwise would be to impose grave legal consequences upon organizational distinctions that are of *de minimis* meaning and effect." *Sunkist*, 370 U.S. at 29. As this Court explained in *Copperweld*, "[e]specially in view of the increasing complexity of corporate operations, a business enterprise should be free to structure itself in ways that serve efficiency of control, economy of operations, and other factors dictated by business judgment without increasing its exposure to antitrust liability." 467 U.S. at 773.[27]

The Court should grant the petition for certiorari to provide lower courts with guidance in this critical area of antritrust law. As is true with our ancillary-restraint point, a decision adopting the foregoing single-enterprise analysis would result in judgment for petitioners.

---

be treated alike, he breathes a sigh of relief that avoids the necessity of drawing the distinction that cannot be drawn: "Perhaps it is enough to be grateful that professional sports have not been organized in [this] way." ANTITRUST LAW ¶ 1478d at 359.

[27] As is well known, some of the automobile manufacturing divisions of GM compete with one another in the consumer marketplace, and doubtless they also compete for supplies, labor, and other inputs. Yet no one would suggest that the single GM company should be subject to Section 1 of the Sherman Act with regard to those areas of competition. Under *Copperweld*, the result should not be different if a similar enterprise operated through separate corporations instead of unincorporated divisions, but that would be the result of the First Circuit's analysis in this case.

CONCLUSION

For the reasons stated above, the Court should grant the petition for a writ of certiorari to the Court of Appeals for the First Circuit.

Respectfully submitted,

JOHN VANDERSTAR *
SONYA D. WINNER
THOMAS O. BARNETT
ETHAN M. POSNER

COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 662-5540
Attorneys for Petitioners

December 1994

* Counsel of Record

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 94-1031

WILLIAM H. SULLIVAN II,
Plaintiff-Appellee,

v.

NATIONAL FOOTBALL LEAGUE, & MEMBERS OF THE NATIONAL FOOTBALL LEAGUE,
Defendants-Appellants.

Heard May 3, 1994

Decided Sept. 16, 1994

As Amended on Denial of Rehearing
Oct. 26, 1994

Before TORRUELLA, Chief Judge, COFFIN, Senior Circuit Judge, and STAHL, Circuit Judge.

TORRUELLA, Chief Judge.

The National Football League and twenty-one organizations owning NFL franchises (referred to collectively as the "NFL") appeal the judgment entered against them after a jury found that the NFL violated the antitrust laws by restricting owners of member football clubs from selling shares in their teams to the public. Plaintiff-appellee, William H. Sullivan, former owner of the New England Pa-

triots football team (the "Patriots"), was awarded a total of $51 million in damages for the losses Sullivan incurred when he had to sell the Patriots to a private buyer after the NFL prevented him from offering 49% of the team to the public in the form of publicly traded stock. Because several prejudicial errors were committed during the trial, we vacate the judgment and remand for a new trial.

I. BACKGROUND

Under Article 3.5 of the NFL's constitution and by-laws, three-quarters of the NFL club owners must approve all transfers of ownership interests in an NFL team, other than transfers within a family. In conjunction with this rule is an uncodified policy against the sale of ownership interests in an NFL club to the public through offerings of publicly traded stock. The members, however, retain full authority to approve any given transfer by a three-quarters vote according to Article 3.5.

Sullivan owned the Patriots from the team's inception in 1959 until October of 1988. When Sullivan formed the Patriots, he and his partner sold non-voting shares of the team to the public beginning in 1960. At that time, the Patriots were in the old American Football League ("AFL"), which was separate from the NFL, and which had no policy against public ownership of teams. In 1966, the AFL and the old NFL merged into a single league. Under the terms of the merger, the new NFL would adopt the old NFL's policy against public ownership. The Patriots, however, were allowed to retain their level of public ownership as a special exception to the rule under a grandfather clause.

In 1976, Sullivan sought to acquire the publicly held shares of the Patriots through a merger of the club into a new Sullivan-owned company. Stockholders approved the transfer and the transaction was subsequently consummated, although some shareholders subsequently brought suit, challenging the sufficiency of the purchase price.

After protracted litigation, the shareholders obtained a judgment requiring Sullivan to pay them a higher price for their shares. The Patriots then became a fully privately owned club.

Sullivan and his son, Chuck Sullivan, who owned the stadium where the Patriots played, began to experience financial difficulties and increasing debt burdens in the mid-1980s. The Sullivans decided that they needed to raise capital to alleviate their financial problems. After the Boston Celtics professional basketball franchise made a public offering of 40% of the team in December of 1986, the Sullivans decided to pursue a similar deal with the Patriots in order to raise cash to cover some of their debts.

On October 19, 1987, the Sullivans met with Stephens, Inc., a small investment banking firm in Little Rock, Arkansas. They discussed a debt financing deal whereby Stephens would loan the Sullivans $80 million dollars, with half going to the Patriots and the other half to Chuck Sullivan's company which owned the Patriots stadium. The Patriot's portion of the loan would be repaid out of the proceeds of the sale of 49% of the Patriots through the offering of public stock. Stephens agreed to look into the possibility of arranging the deal, but informed the Sullivans that they would first have to get NFL approval. Sullivan ultimately never obtained NFL approval and the deal with Stephens never progressed beyond some preliminary discussions.

At a meeting of the NFL owners on October 27, 1987, Sullivan raised his stock sale idea with the other owners and asked for a modification of the NFL's policy against public ownership to allow for certain controlled sales of minority interests in NFL clubs. Alternatively, Sullivan requested a waiver from the public ownership policy for his contemplated public offering of the Patriots. Sullivan's request was eventually tabled at this meeting. Discussions

continued among the owners and, at one point, Sullivan counted 17 of the 21 owners needed for approval as being in favor of allowing him to make his public offering (seven owners were still undecided). Pete Rozelle, NFL Commissioner at the time, told Sullivans that he was not in favor of Sullivan's proposals and that league approval was "very dubious." Sullivan ultimately never asked for a vote on amending the ownership policy or on waiving the policy for the Patriots, and the NFL never held such a vote. Sullivan claims that he did not ask for a vote because it would have been futile.

In October of 1988, Sullivan sold the Patriots for approximately $83.7 million to KMS Patriots L.P. ("KMS"), a limited partnership owned by Victor Kiam and Francis Murray. Sullivan alleges that, absent the NFL's public ownership policy, he would have been able to retain a majority share of a rapidly appreciating asset with a high potential for future profits. Instead, Sullivan asserts, he was forced to sell the Patriots at a depressed price to private buyers.

On May 16, 1991, Sullivan sued the NFL claiming that, among other things, the NFL had violated the Sherman-Anti-trust Act, 15 U.S.C. §§ 1-2, by preventing him from selling 49% of the Patriots to the public in an equity offering. Sullivan alleged that, as a result, he was forced to sell the entire team to a private buyer at a fire sale price in order to pay off existing debts. Prior to trial, the district court dismissed Sullivan's claim under § 2 of the Sherman Act along with various state law claims. After a trial on Sullivan's claim under § 1 of the Sherman Act, the jury rendered a verdict for Sullivan in the amount of $38 million, which the judge reduced through remittitur to $17 million. Pursuant to 15 U.S.C. § 15, which provides for treble damages for antitrust violations, the court entered a final judgment for Sullivan of $51 million.

II. ANALYSIS

The NFL has raised a number of issues on appeal concerning the application of § 1 of the Sherman Act to the facts of this case, which, according to the NFL, entitle it to judgment as a matter of law. We address these issues first to see if the present case should be dismissed, and we ultimately conclude that it should not. We next address the NFL's allegations of trial error and we find that several of them require that we overturn the verdict in this case and order a new trial.

The first set of issues involves the district court's denial of the NFL's motions for judgment as a matter of law under Fed.R.Civ.P. 50. We review the court's decision *de novo,* using the same stringent decisional standards that controlled the district court. *Gallagher v. Wilton Enterprises, Inc.*, 962 F.2d 120, 125 (1st Cir.1992); *Hendricks & Assocs., Inc. v. Daewoo Corp.*, 923 F.2d 209, 214 (1st Cir.1991). Under these standards, judgment for the NFL can only be ordered if the evidence, viewed in the light most favorable to Sullivan, points so strongly and overwhelmingly in favor of the NFL, that a reasonable jury could not have arrived at a verdict for Sullivan. *Gallagher,* 962 F.2d at 124-25; *Hendricks,* 923 F.2d at 214.

III. ISSUES ALLEGEDLY REQUIRING JUDGMENT FOR THE NFL

A. Lack of Antitrust Injury

To establish an antitrust violation under § 1 of the Sherman Act, Sullivan must prove that the NFL's public ownership policy is "in restraint of trade." *Monohan's Marine, Inc. v. Boston Whaler, Inc.*, 866 F.2d 525, 526 (1st Cir.1989). Under antitrust law's "rule of reason," the NFL's policy is in restraint of trade if the anticompetitive effects of the policy outweigh the policy's legitimate business justifications. *Id.* at 526-27 (citing *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717,

723, 108 S.Ct. 1515, 1519, 99 L.Ed.2d 808 (1988)). Anticompetitive effects, more commonly referred to as "injury to competition" or "harm to the competitive process," are usually measured by a *reduction in output* and an *increase in prices* in the relevant market. *National Collegiate Athletic Ass'n v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 104-07, 104 S.Ct. 2948, 2962-63, 82 L.Ed.2d 70 (1984) ("Restrictions on price and output are the paradigmatic examples of restraints of trade") (hereinafter "*NCAA*"); *Chicago Professional Sports Ldt. Partnership v. National Basketball Association*, 961 F.2d 667, 670 (7th Cir.), *cert. denied*, —— U.S. ——, 113 S.Ct. 409, 121 L.Ed.2d 334 (1992). Injury to competition has also been described more generally in terms of *decreased efficiency* in the marketplace which negatively impacts consumers. *Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 21-22 (1st Cir.1990), *cert. denied*, 499 U.S. 931, 111 S. Ct. 1337, 113 L.Ed.2d 268 (1991); *Interface Group, Inc. v. Massachusetts Port Auth.*, 816 F.2d 9, 10 (1st Cir.1987). Thus, an action harms the competitive process "when it obstructs the achievement of competition's basic goals—lower prices, better products, and more efficient production methods." *Town of Concord*, 915 F.2d at 22.

The jury determined in this case, via a special verdict form, that the relevant market is the "nationwide market for the sale and purchase of ownership interests in the National Football League member clubs, in general, and in the New England Patriots, in particular." The jury went on to find that the NFL's policy had an "actual harmful effect" on competition in this market.

The NFL argues on appeal that Sullivan has not established the existence of any injury to competition, and thus has not established a restraint of trade that can be attributed to the NFL's ownership policy. The league's attack is two-fold, asserting (1) that NFL clubs do not compete with each other for the sale of ownership inter-

ests in their teams so there exists no competition to be injured in the first place; and (2) Sullivan did not present sufficient evidence of injury to competition from which a reasonable jury could conclude that the NFL's policy restrains trade. Although we agree with the NFL that conceptualizing the harm to competition in this case is rather difficult, precedent and deference to the jury verdict ultimately require us to reject the NFL's challenge to the finding of injury to competition.

Critically, the NFL does *not* challenge on appeal the jury's initial finding of the relevant market and no corresponding challenge was raised at trial.[1] As a result, the NFL faces an uphill battle in its attack on the presence of an injury to competition. Given the existence of a relevant market for ownership interests in NFL teams, it is reasonable to presume that a policy restricting the buying and selling of such ownership interest injures competition in that market. The NFL nevertheless maintains that NFL teams do not compete against each other for the sale of their ownership interests, even if we accept that a market exists for such ownership interests.

1. *No Competition Subject to Injury as Matter of Law*

The NFL correctly points out that member clubs must cooperate in a variety of ways, and may do so lawfully,

---

[1] The NFL argues in passing that certain expert testimony related to the relevant market issue was inherently unreasonable and thus could not support the jury's relevant market finding. We do not consider this passing argument to be sufficient to raise the relevant market issue on appeal as matters averted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived on appeal. *United States v. Innamorati*, 996 F.2d 456, 468 (1st Cir.1993). More importantly, the NFL did not challenge the relevant market issue in either its directed verdict motion or in its motion for judgment as a matter of law. We will not consider arguments which could have been, but were not, advanced below. *Domegan v. Fair*, 859 F.2d 1059, 1065 (1st Cir.1988).

in order to make the football league a success. *See United States Football League v. National Football League,* 842 F.2d 1335, 1372 (2d Cir.1988); *Los Angeles Memorial Coliseum Comm'n v. National Football League,* 726 F.2d 1381, 1391-92 (9th Cir.), *cert. denied,* 469 U.S. 990, 105 S.Ct. 397, 83 L.Ed.2d 331 (1984) (hereinafter *"L.A. Coliseum"*); *North American Soccer League v. National Football League,* 670 F.2d 1249, 1251 (2d Cir.), *cert. denied,* 459 U.S. 1074, 103 S.Ct. 499, 74 L.Ed.2d 639 (1982) (hereinafter *"NASL"*). On the other hand, it is well established that NFL clubs also compete with each other, both on and off the field, for things like fan support, players, coaches, ticket sales, local broadcast revenues, and the sale of team paraphernalia. *Mid-South Grizzlies v. National Football League,* 720 F.2d 772, 786-87 (3d Cir.1983), *cert. denied,* 467 U.S. 1215, 104 S.Ct. 2657, 81 L.Ed.2d 364 (1984); *L.A. Coliseum,* 726 F.2d at 1390, 1393, 1395, 1397. The question of whether competition exists between NFL teams for sale of their ownership interests, such that the NFL's ownership policy injures this competition, is ultimately a question of fact. The NFL would have us find, however, that, as a matter of law, NFL teams do not compete against each other for the sale of their ownership interests. We decline to make such a finding.

The NFL relies on a series of cases which allegedly stand for the "well established" rule that a professional sports league's restrictions on who may join the league or acquire an interest in a member club do not give rise to a claim under the antitrust laws. *Seattle Totems Hockey Club, Inc. v. National Hockey League,* 783 F.2d 1347 (9th Cir.), *cert. denied,* 479 U.S. 932, 107 S.Ct. 405, 93 L.Ed.2d 357 (1986); *Fishman v. Estate of Wirtz,* 807 F.2d 520 (7th Cir.1986); *Mid-South Grizzlies,* 720 F.2d at 772; *Levin v. National Basketball Ass'n,* 385 F.Supp. 149 (S.D.N.Y.1974). These cases, all involving a professional sport's league's refusal to ap-

prove individual transfers of team ownership or the creation of new teams, do not stand for the broad proposition that no NFL ownership policy can injure competition. *See, e.g., NASL,* 670 F.2d at 1259-61 (finding that the NFL's policy against cross-ownership of NFL teams and franchises in competing sports leagues, which also effectively barred certain owners who owned other sports franchises from purchasing NFL teams, injured competition between the NFL and competing sports leagues and thus violated § 1 of the Sherman Act).

None of the cases cited by the NFL considered the particular relevant market that was found by the jury in this case or a league policy against public ownership. *Seattle Totems* and *Mid-South Grizzlies* considered potential *inter*-league competition when a sports league rejected plaintiffs' applications for new league franchises. *Seattle Totems,* 783 F.2d at 1349-50; *Mid-South Grizzlies,* 720 F.2d at 785-86. Those decisions found no injury to competition because the plaintiffs were not competing with the defendant sports leagues, but rather, were seeking to join those leagues. *Seattle Totems,* 783 F.2d at 1350; *Mid-South Grizzlies,* 720 F.2d at 785-86. *Mid-South Grizzlies* left open the possibility that potential *intra*-league competition between NFL football clubs could be harmed by the NFL's action, but found that the plaintiff in that case had not presented sufficient evidence of harm to such competition. *Mid-South Grizzlies,* 720 F.2d at 786-87.

The *Fishman* and *Levin* cases concerned the National Basketball Association's ("N.B.A.") rejection of plaintiffs' attempts to buy an existing team. *Fishman,* 807 F.2d at 525-31; *Levin,* 385 F.Supp. at 150-51. Those cases also based their finding that there was no injury to competition on the fact that the plaintiffs were seeking to join with, rather than compete against, the N.B.A. *Fishman,* 807 F.2d at 544; *Levin,* 385 F.Supp. at 152. Neither case considered whether competition between teams for investment capital was injured. As pointed out in *Piazza v.*

Major League Baseball, 831 F.Supp. 420 (E.D.Pa. 1993), *Fishman* explicitly recognized the potential for competition in the market for ownership of teams, although the plaintiff had failed to raise the issue, and *Levin* simply presumed, incorrectly, that there could never be any competition among league members. *Piazza*, 831 F.Supp. at 430-31 & n. 16 (citing *Fishman*, 807 F.2d at 532 n. 9; and *Levin*, 385 F.Supp. at 152).

The important distinction to make between the cases cited by the NFL and the present case is that here Sullivan alleges that the NFL's policy against public ownership generally restricts competition between clubs for the sale of their ownership interest, whereas in the aforementioned cases, a league's refusal to approve a given sale transaction or a new team merely prevented particular outsiders from joining the league, but did not limit competition between the teams themselves. To put it another way, the NFL's public ownership policy allegedly does not merely prevent the replacement of one club owner with another—an action having little evident effect on competition—it compromises the entire process by which competition for club ownership occurs.[2]

We take a moment to briefly address a related argument raised by the NFL to the effect that NFL clubs are unable to conspire with each other under § 1 of the Sherman Act because they function as a single enterprise

---

[2] This same argument distinguishes cases cited by the NFL for the proposition that a franchisor's disapproval of a proposed sale of a franchise does not give rise to an antitrust injury. *See Kestenbaum v. Falstaff Brewing Corp.*, 514 F.2d 690 (5th Cir.1975), *cert. denied*, 424 U.S. 943, 96 S.Ct. 1412, 47 L.Ed.2d 349 (1976); *McDaniel v. General Motors Corp.*, 480 F.Supp. 666 (E.D.N.Y. 1979). Individual decisions to block the sale of a franchise do not implicate the harm to competition that is caused by a policy restricting all sales of a certain type of ownership interest. Only the broad-based policy has the potential to compromise the entire competitive process for the buying and selling of a good in a relevant market.

in relation to the league's public ownership policy. The NFL asserts that the Supreme Court's holding in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984), controls the facts of this case and overturns prior caselaw holding that NFL clubs do not constitute a single enterprise but rather, are separate entities which were capable of conspiring with each other under § 1. *See L.A. Coliseum*, 726 F.2d at 1387-90; *NASL*, 670 F.2d at 1256-58.

We do not agree that *Copperweld*, which found a corporation and its wholly owned subsidiary to be a single enterprise for purposes of § 1, *Copperweld*, 467 U.S. at 771, 104 S.Ct. at 2741, applies to the facts of this case or affects the prior precedent concerning the NFL. *See McNeil v. National Football League*, 790 F.Supp. at 871, 879-80 (D.Minn.1992) (holding that *Copperweld* did not apply to the NFL and its member clubs and finding the clubs to be separate entities capable of conspiring together under § 1). *Copperweld*'s holding turned on the fact that the subsidiary of a corporation, although legally distinct from the corporation itself, "pursue[d] the common interests of the whole rather than interests separate from those of the corporation itself." *Copperweld*, 467 U.S. at 770, 104 S.Ct. at 2741. As emphasized in *City of Mt. Pleasant, Iowa v. Associated Elec. Co-op., Inc.*, 838 F.2d 268 (8th Cir.1988), upon which the NFL relies for the application of *Copperweld* to this case, the critical inquiry is whether the alleged anti-trust conspirators have a "unity of interests" or whether, instead, "any of the defendants has pursued interests diverse from those of the cooperative itself." *Id.* at 274-77 (defining "diverse" as "interests which tend to show that any two of the defendants are, or have been, actual or potential competitors"). As we have already noted, NFL member clubs compete in several ways off the field, which itself tends to show that the teams pursue diverse interests and thus are not a single enterprise under § 1.

Ultimately, the NFL's *Copperweld* challenge is subsumed under the question of whether or not the evidence can support a finding that NFL teams compete against each other for the sale of their ownership interests. Proof of such competition defeats both the NFL's challenge to the existence of an injury to competition and the NFL's *Copperweld* argument as well. Insufficient proof of such competition would require a judgment in favor of the NFL anyway, regardless of the implications under *Copperweld*. As we discuss below, the jury's finding that there exists competition between teams for the sale of ownership interests was based on sufficient evidence.

2. *Insufficient Evidence of Harm to Competition*

The NFL contends that Sullivan did not present sufficient evidence concerning: (1) the existence of competition between NFL clubs for the sale of ownership interests, or (2) a decrease in output, an increase in prices, a detrimental effect on efficiency or other incidents of harm to competition in the relevant market, from which a reasonable jury could conclude that the NFL's policy injured competition. Although we agree that the evidence of all these factors is rather thin, we disagree that the evidence is too thin to support a jury verdict in Sullivan's favor.

With respect to evidence of the existence of competition for the sale of ownership interests, one of Sullivan's experts, Professor Roger Noll, testified that "one of the ways in which the NFL exercises monopoly power in the market for the franchises and ownership is by excluding certain people from owning all or part—any type part of an NFL franchise." Dr. Noll explained that this "enables a group of owners, in this case, you only need eight owners, to exclude from the League and from competing with them, people who might be more effective competitors than they are." The record also contains statements from several NFL owners which could reasonably be

interpreted as expressions of concern about their ability to compete with other teams in the market for investment capital in general, and for the sale of ownership interests in particular. For example, Arthur Rooney II of the Pittsburgh Steelers stated in a letter that he did not "believe that the individually or family owned teams will be able to compete with the consolidated groups." Ralph Wilson of the Buffalo Bills stated that big corporations should not own teams because it gives them an "unfair competitive advantage" over other teams since corporations will funnel money into the team and make it "more competitive" than the other franchises. Former NFL Commissioner Pete Rozelle admitted that similar sentiments had been expressed by NFL members.

Although it is not precisely clear that the "competition" about which Noll, Rooney, and Wilson were discussing is the same competition at issue here—that is competition for the sale of ownership interests—a jury could reasonably interpret these statements as expressing a belief that the competition exists between teams for the sale of ownership interests. The statements of the two NFL owners imply that greater access to capital for all teams will put increased pressure on some teams to compete with others for that capital, and all the statements reveal that the ownership rules, particularly the rule against public ownership, is the main obstacle preventing such access. The fact that ownership by "consolidated groups" is not necessarily the same as public ownership does not affect the conclusion that teams face competitive pressure in selling their ownership interests generally to whoever might buy them. We also note that evidence of actual, present competition is not necessary as long as the evidence shows that the potential for competition exists. *See L.A. Coliseum,* 726 F.2d at 1394 (discussing significance of *potential* competition, especially where challenged policy limits such competition so that it is not evident in practice). It would be difficult indeed to

provide direct evidence of competition when the NFL effectively prohibits it.

The NFL focuses on the fact that Professor Noll testified that many of the purchasers of Patriots' stock would be New England sports fans and others in the New England area. The NFL points out that other NFL teams would not compete with the Patriots for the sale of stock to their own fans. This argument slightly distorts Professor Noll's testimony. Professor Noll stated that local souvenir buyers would be one portion of the market for Patriots stock. Professor Noll also testified several times that other investors would buy Patriots stock as well, for investment purposes. Noll's point was that the souvenir buyers would serve to bid up the price of the stock above what the price would normally be if the Patriots were a regular company. His testimony did not preclude a finding that NFL teams compete against each other for investment capital via the sale of ownership interests.

The record also contains sufficient evidence of the normal incidents of injury to competition from the NFL's policy—reduced output, increased prices, and reduced efficiency—to support the jury's verdict. As Dr. Noll pointed out in his testimony, the NFL's policy "excludes individuals . . . who might want to own a share of stock in a professional football team." Several NFL officials themselves admitted that the policy restricts the market for investment capital among NFL teams. There is thus little dispute that the NFL's ownership policy reduces the available output of ownership interests.

The NFL is correct that, in one sense, the overall pool of potential output is fixed because there are only 28 NFL teams and, although their value may fluctuate, the quantity of their ownership interests cannot. However, the NFL's public ownership policy completely wipes out a certain type of ownership interests—public ownership of stock. By restricting output in one *form* of ownership,

the NFL is thereby reducing the output of ownership interests overall. In other words, the NFL is literally restricting the output of a product—a share in an NFL team.

There was considerable testimony concerning the price effects of the NFL policy. Both the Sullivan's experts testified that the policy depressed the price of ownership interests in NFL teams because NFL franchises would normally command a premium on the public market relative to their value in the private market, which is all that the league currently permits. Professor Noll testified that fan loyalty would push up the price of ownership interests if sales to the public were allowed. Even former Commissioner Pete Rozelle acknowledged that "it was pointed out, with justification, it has been over the years, that [the ownership policy] does restrict your market and, very likely, the price you could get for one of our franchises if you wanted to sell it, because you are eliminating a very broad market. . . . And they have said that there is a depression on the price they could get for their franchise."

The NFL points out that the alleged effect of its ownership policy is to *reduce* prices of NFL team ownership interests, rather than to raise prices which is normally the measure of an injury to competition. *E.g., Town of Concord,* 915 F.2d at 22. We acknowledge that it is not clear whether, absent some sort of dumping or predatory pricing, *see, e.g., Monahan's Marine, Inc. v. Boston Whaler, Inc.,* 866 F.2d 525, 527 (1st Cir.1989), a decrease in prices can indicate injury to competition in a relevant market. The Supreme Court has emphasized, however, that overall consumer preferences in setting output and prices is more important than higher prices and lower output, *per se,* in determining whether there has been an injury to competition. *NCAA,* 468 U.S. at 107, 104 S.Ct. at 2963. In this case, regardless of the exact price effects of the NFL's policy, the overall market

effects of the policy are plainly unresponsive to consumer demand for ownership interests in NFL teams. Dr. Noll testified that fans are interested in buying shares in NFL teams and that the NFL's policy deprives fans of this product. Moreover, evidence was presented concerning the public offering of the Boston Celtics professional basketball team which demonstrated, according to some of the testimony, fan interest in buying ownership of professional sports teams. Thus, a jury could conclude that the NFL's policy injured competition by making the relevant market "unresponsive to consumer preference." *Id.*[3]

As for overall efficiency of production in the relevant market,[4] Sullivan's experts testified that the NFL's policy hindered efficiency gains, and that allowing public ownership would make for better football teams. Professor Noll stated that the NFL's public ownership policy pre-

---

[3] The NFL maintains that price and output are not affected because its ownership policy does not limit the number of games or teams, does not raise ticket prices or the prices of game telecasts and does not affect the normal consumer of the NFL's product in any other way. Such facts might be relevant to an inquiry of whether the NFL's policy harms overall efficiency, *see infra* note [4], but it is not relevant to whether the policy affects output and prices *in the relevant market* for ownership interests. Just because consumers of "NFL football" are not affected by output controls and price increases does not mean that consumers of a product in the relevant market are not so affected. In this case, two types of consumers are denied products by the NFL policy: consumers who want to buy stock of the Patriots or other teams, and consumers like Sullivan who want to "purchase" investment capital in the market for public financing.

[4] Although the product at issue in the relevant market is "ownership interests," efficiency in production of that product can be measured by the value of the ownership interest. That is, an improved product produced more efficiently will be reflected in the value of the output in question (regardless of the price). In this case, the value of the product depends on the success of the Patriots' football team, the overall efficiency of its operations, and the success of the NFL in general.

vented individuals who might be "more efficient and much better at running a professional football team" from owning teams. Dr. Noll also stated that publicly owned NFL teams would be better managed, and produce higher quality entertainment for the fans. Noll testified that the ownership rule excluded certain types of management structures which would likely be more efficient in running the teams, resulting in higher franchise values. One NFL owner, Lamar Hunt, acknowledged that increased access to capital can improve a team's operations and performance. A memorandum prepared by an NFL staff member stated that changes to the NFL's public ownership policy could contribute to each NFL team's own financial strength and viability, which in turn would benefit the entire NFL because the league has a strong interest in having strong, viable teams.

The NFL presented a large amount of evidence to the contrary and now claims on appeal that Sullivan's position was based on nothing more than sheer speculation. We have reviewed the record, however, and we cannot say that the evidence was so overwhelming that no reasonable jury could find against the NFL and in favor of Sullivan. We therefore refuse to enter judgment in favor of the NFL as a matter of law.

B. Ancillary Benefits

The NFL next argues that even if its public ownership policy injures competition in a relevant market, it should be upheld as *ancillary* to the legitimate joint activity that is "NFL football" and thus not violative of the Sherman Act. We take no issue with the proposition that certain joint ventures enable separate business entities to combine their skills and resources in pursuit of a common goal that cannot be effectively pursued by the venturers acting alone. *See, e.g., Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 99 S.Ct. 1551, 60 L.Ed.2d 1 (1979). We also do not dispute that a "re-

straint" that is ancillary to the functioning of such a joint activity—i.e. one that is required to make the joint activity more efficient—does not necessarily violate the antitrust laws. *Broadcast Music,* 441 U.S. at 23-25, 99 S.Ct. at 1564-1565; *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.,* 792 F.2d 210, 223-24 (D.C.Cir.1986), *cert. denied,* 479 U.S. 1033, 107 S.Ct. 880, 93 L.Ed.2d 834 (1987); *see also Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.,* 472 U.S. 284, 295-96, 105 S.Ct. 2613, 2620, 86 L.Ed.2d 202 (1985). We further accept, for purposes of this appeal, that rules controlling who may join a joint venture can be ancillary to a legitimate joint activity and that the NFL's own policy against *public* ownership constitutes one example of such an ancillary rule. Finally, we accept the NFL's claim that its public ownership policy contributes to the ability of the NFL to function as an effective sports league, and that the NFL's functioning would be impaired if publicly owned teams were permitted, because the short-term dividend interests of a club's shareholder would often conflict with the long-term interests of the league as a whole. That is, the policy avoids a detrimental conflict of interests between team shareholders and the league.

We disagree, however, that these factors are sufficient to establish as a matter of law that the NFL's ownership policy does not unreasonably restrain trade in violation of § 1 of the Sherman Act. The holdings in *Broadcast Music, Rothery Storage,* and *Northwest Stationers,* do not throw the "rule of reason" out the window merely because one establishes that a given practice among joint venture participants is ancillary to legitimate and efficent activity—the injury to competition must still be weighed against the purported benefits under the rule of reason. *See, e.g., Broadcast Music,* 441 U.S. at 24, 99 S.Ct. at 1565 (holding only that a particular ancillary restraint did not constitute a *per se* violation of the Sherman Act and remanding for a determination of the case under a

rule of reason analysis); *Northwest Stationers,* 472 U.S. at 293-98, 105 S.Ct. at 2619 (same); *cf. SCFC ILC, Inc. v. Visa U.S.A. Inc.,* —— F.3d ——, 1994 WL 515989, *6, 1994 U.S.App. LEXIS 26849, *19, (10th Cir. Sept. 23, 1994) (rejecting arguments that joint ventures require a "special" rule of reason review, but finding no violation of Section 1 on the specific facts of the case).

One basic tenet of the rule of reason is that a given restriction is not reasonable, that is, its benefits cannot outweigh its harm to competition, if a reasonable, less restrictive alternative to the policy exists that would provide the same benefits as the current restraint. *L.A. Coliseum,* 726 F.2d at 1396. The record contains evidence of a less restrictive alternative to the NFL's ownership policy that may yield the same benefits as the current policy. Sullivan points to one proposal to amend the current ownership policy by allowing for the sale of minority, nonvoting shares of team stock to the public with restrictions on the size of the holdings by any one individual. Dividend payments, if any, would be within the firm control of the NFL majority owner. Under such a policy, it would be reasonable for a jury to conclude that private control of member clubs is maintained, conflicts of interest are avoided, and all the other "benefits" of the NFL's joint venture arrangement are preserved while at the same time teams would have access to the market for public investment capital through the sale of ownership interests. Whether this proposed amendment is indeed a less restrictive, equally beneficial policy, is a jury question we need not reach here. We merely point to it as one factor a jury may consider in its role of reason analysis.

C. Causation of Injury in Fact

The NFL next argues that Sullivan did not present sufficient evidence to support a finding by the jury that the NFL's public ownership policy caused injury in fact to Sullivan. An antitrust plaintiff must prove that he or

she suffered damages from an antitrust violation and that there is a causal connection between the illegal practice and the injury. *Associated General Contractors, Inc. v. California State Council of Carpenters,* 459 U.S. 519, 532-33 & n. 26, 103 S.Ct. 897, 906 n. 26, 74 L.Ed.2d 723 (1983); *Blue Shield of Virginia v. McCready,* 457 U.S. 465, 476-78, 102 S.Ct. 2540, 2546-48, 73 L.Ed.2d 149 (1982); *Engine Specialties, Inc. v. Bombardier Ltd.,* 605 F.2d 1, 13 (1st Cir.1979), *cert. denied,* 446 U.S. 983, 100 S.Ct. 2964, 64 L.Ed.2d 839 (1980). "Plaintiffs need not prove that the antitrust violation was the sole cause of their injury, but only that it was a material cause." *Engine Specialties,* 605 F.2d at 14.

Sullivan asserted at trial that the NFL's ownership policy forced him to sell the Patriots at a depressed price, far below what the team would have been worth in a market that included public ownership of the team. "But for" the NFL's policy, Sullivan claims, he would have been able to offer 49% of the Patriots to the public for $70 million, pay off his debts, and retained ownership of a much more valuable and profitable team.

The NFL contends that Sullivan failed to establish a causal connection between his "forced" sale of the Patriots and the NFL's ownership policy because (1) Sullivan never officially requested a vote on his proposals to amend or waive the policy so there is no way of knowing whether the policy would have prevented a public offering in the first place; and (2) Sullivan never established that the public stock sale was feasible or potentially successful and thus an alternative to what ultimately happened (i.e., even if the NFL did not have a policy against public ownership, Sullivan would still have had to sell his team because the Patriots stock sale would not have happened or would not have raised enough money to pay off Sullivan's debts and prevent a fire sale of the team). Although the evidence of causation is not overwhelming, it is nevertheless sufficient to support the verdict.

Regarding the NFL's first claim that Sullivan never called for a vote from the owners to change or waive the ownership policy, Sullivan presented sufficient evidence to show that the NFL essentially rejected Sullivan's request, even though no official vote was taken. Under certain circumstances, an antitrust plaintiff must make a demand on the defendant to allow the plaintiff to take some action or obtain some benefit, which the defendant's challenged practice is allegedly preventing the plaintiff from taking or obtaining, in order to prove that the practice caused injury in fact to the plaintiff. *See Wells Real Estate, Inc. v. Greater Lowell Bd. of Realtors,* 850 F.2d 803, 816 (1st Cir.), *cert. denied,* 488 U.S. 955, 109 S.Ct. 392, 102 L.Ed.2d 381 (1988); *Out Front Productions, Inc. v. Magid,* 748 F.2d 166, 170 (3d Cir. 1984). Such a requirement only applies, however, where the plaintiff cannot otherwise prove that the illegal practice exists or that the practice is preventing the plaintiff from competing in the relevant market; in such cases, a refused demand is the only reliable evidence of causation. *Out Front,* 748 F.2d at 169-70. In cases like the present one, an official request and official refusal is not necessary to establish causality because there is other evidence showing that defendant's practice caused injury in fact to the plaintiff. *Zenith Radio Corp. v. Hazeltine Research,* 395 U.S. 100, 120 n. 15, 89 S.Ct. 1562, 1575 n. 15, 23 L.Ed.2d 129 (1969); *Continental Ore Co. v. Union Carbide & Carbon Corp.,* 370 U.S. 690, 699-702, 82 S.Ct. 1404, 1410-12, 8 L.Ed.2d 777 (1962). Theer is certainly no blanket requirement, as the NFL maintains, in *Wells* or any other case, that Sullivan must call for a vote and obtain an official refusal from the NFL, even if such a request would be futile. *See, e.g., Wells,* 850 F.2d at 816 (finding failure to request access to multiple listing service was critical because "[t]here was no evidence of a group boycott;" although court noted request "may have been futile," there was no evidence to indicate that it would have been, so an actual request was required);

Chicago Ridge Theatre Ltd. Partnership v. M & R Amusement Corp., 855 F.2d 465, 470 (7th Cir.1988) (futility obviates the need for a demand). Certainly, if Sullivan can prove futility independent of any official request, he need not show that he actually called for a vote and received a denial from the other NFL owners.

The jury in this case heard evidence that would allow it to conclude that the NFL effectively denied Sullivan's request for a waiver or amendment of the public ownership policy, and that an official vote would indeed have been futile. The NFL's policy against public ownership was long-standing, and the policy withstood several efforts to change it over the years as proffered amendment proposals were never brought to a vote. Sullivan requested a waiver of, or amendment to, the policy at a meeting of the owners on October 27, 1987. His request was tabled. After further discussions, then-Commissioner Pete Rozelle said that he opposed the proposal and that the chances for league approval were "very dubious." Although Sullivan was only four votes shy of winning a vote, with seven votes still undecided, the jury could reasonably conclude that, in light of the Commissioner's statement, Sullivan tried but failed to convince those undecided owners to vote in his favor and that an actual vote would have been futile. The evidence is thus sufficient to support a finding that the NFL's policy was effectively enforced against Sullivan and that the policy did in fact, when considered with the evidence discussed below, prevent Sullivan from making his public offering of 49% of the Patriots.

Sullivan also presented sufficient evidence to support a finding that the Patriots stock sale was both feasible and potentially successful. Sullivan met with Stephens, Inc., an investment banking firm, to discuss a deal whereby Stephens would arrange for a loan of $80 million to Sullivan and his son, half of which would be paid back out of the proceeds of the Patriots stock offering,

which Stephens would also arrange. In a subsequent letter, Stephens stated that it had been retained to assist in the "private placement of $80 million of debt" and set out some preliminary terms and conditions. Although specifics of the public offering were not discussed, and Stephens did not determine whether the stock offering was ultimately feasible, Stephens repeatedly made it clear to Sullivan that NFL approval was required—indeed Stephens specifically singled out NFL approval as *the* prerequisite—before Stephens could proceed any further with efforts to prepare for the placement of Patriots stock.

As discussed above, NFL approval was never obtained. Therefore, the jury could conclude that lack of approval was the reason Stephens was unwilling to proceed with the deal, even though Stephens also expressed some concern about Sullivan's financial and legal troubles. The jury also heard testimony that Charles Allen, a prominent investment banker in New York, thought the Patriots public offering was feasible and that he was potentially interested in arranging the deal. Sullivan himself testified that the stock sale was feasible based on his experience with the previous public offering of Patriots stock in 1960, and based on the pubic offering of the Boston Celtics. Finally, one of Sullivan's experts, Patrick Brake, testified that the public offering would have been feasible had the NFL not blocked it.

In addition, despite significant financial and legal problems with the Patriots, the evidence is sufficient to support a finding that Sullivan could have solved these problems in the course of the public offering and, further, that he could have brought off a successful stock sale that would have raised at least $70 million.

The NFL focuses its challenge to the potential success of Sullivan's offering on the testimony of Patrick Brake, who provided the $70 million figure as the value for the stock sale. According to the NFL, Brake's testimony could not support the jury's finding on causation because

it was not supported by any facts, it was not grounded in any rational methodology, and it ignored important factors indicating that the Patriots offering would not be a success. The NFL does not challenge the admissibility of Brake's opinion but, instead, claims, that his opinion cannot support the jury's finding that the Patriots stock sale would have been a success if the NFL had allowed it to happen.

"When an expert opinion is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury's verdict." *Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp.*, —— U.S. ——, ——, 113 S.Ct. 2578, 2589, 125 L.Ed.2d 168 (1993); *accord Price v. General Motors Corp.*, 931 F.2d 162, 165 (1st Cir. 1991); *Richardson v. Richardson-Merrell, Inc.*, 857 F.2d 823, 829 (D.C. Cir.1988), *cert. denied*, 493 U.S. 882, 110 S.Ct. 218, 107 L.Ed.2d 171 (1989). A jury verdict cannot rest solely on an expert's "bottom line" conclusion, without some underlying facts and reasons, or a logical inferential process to support the expert's opinion. *Mid-State Fertilizer Co. v. Exchange National Bank*, 877 F.2d 1333, 1339 (7th Cir.1989).

We agree that the facts and reasoning underlying Brake's opinions and testimony leave much to be desired from the standpoint of a factfinder charged with determining the facts. As a matter of law, however, Brake provided enough of a basis for his opinions and had sufficient facts to back his opinions up, to support, in combination with the evidence from other sources, a jury finding of potential success of the Patriots stock sale venture. To begin with, Brake stated in his testimony that his opinion was based on a review of documents and depositions in the case, a review of the prospectus for the Boston Celtics public offering, the fact that future television revenues for the Patriots were likely to increase due to the Patriots' appearance in the Super Bowl, and the fact that

the public stock for NFL teams, like the Patriots, would trade at a premium value over what the club would otherwise be worth. Brake also stated that he looked at a financial statement of the Patriots and was apprised of some of the debt and loss history of the club. Other testimony and evidence at trial supported the claim that stock of NFL teams would sell for a premium above the club's private sale value and the claim that TV revenues to the NFL teams would increase. Sullivan himself testified that a public offering would be successful based upon the success of his earlier offering of Patriots stock and on the results of the Celtics public offering. There was also testimony—highly disputed, but potentially credible testimony nonetheless—to the effect that the Celtics' stock offering was a success and that the Patriots stock offering could be patterned after the Celtics offering.

As for the source of Brake's specific $70 million figure for the likely proceeds from a sale of 49% of the Patriots, Brake explained a two-step public offering process which, after subcontracting underwriting fees, would yield the Sullivan's (*sic*) $70 million. Brake arrived at this figure after starting with a base value of $150 million for the Patriots. Given the $80 million private sale price of the Patriots obtained by Sullivan when he actually sold the team, and given the testimony by Brake and others that public stock of NFL teams would sell at a premium, we cannot say that the opinion by Brake, an investment banking expert, was unreasonably or "not supported by sufficient facts to validate it in the eyes of the law." *Brooke Group*, —— U.S. at ——, 113 S.Ct. at 2589.

Brake's testimony was not merely conclusory. Rather, it was embellished by various explanations and justifications. His testimony was also not overwhelmingly contradicted by the weight of the evidence or inherently contradictory, unreasonable or irrational. Brake did overlook some important factors that contradicted his opinion, but he was questioned about these factors on cross-

examination and the NFL argued them before the jury. The factors do not invalidate Brake's opinion as a matter of law; rather, they merely go to the weight and credibility of his opinions which are matters for the jury to consider. The basis of the opinion regarding the success of the Patriots public offering may be flimsy, but it is not nonexistent or irrational as a matter of law.

Although we share the NFL's skepticism that Sullivan would have succeeded in his public offering if the NFL had allowed him to try it, we cannot say that, as a matter of law, the evidence was so overwhelming that no reasonable jury could find that the NFL's policy harmed Sullivan by preventing him from doing something he would otherwise have been able to do. We therefore reject the NFL's claim that it is entitled to a judgment in its favor on the basis that Sullivan failed to prove his injury was caused by the alleged antitrust violation.

D. Assignment of Antitrust Claim

The NFL argues that Sullivan cannot bring this lawsuit because he sold his antitrust claim when he sold the Patriots. The sale contract between Sullivan and KMS Patriots, L.P., provided that Sullivan transferred to the buyers "all other assets" of the Patriots' and its holding company,[5] besides those specifically listed and those specifically excluded. None of the listed or excluded assets include an antitrust claim. According to the NFL, the term "all other assets" should be interpreted broadly to include the present antitrust cause of action. We disagree. Absent some express language to the effect that

---

[5] The language of the contract actually states "all other assets of Selling Group," which includes Sullivan himself. However, neither party asserts that Sullivan intended to transfer all his personal assets with this clause and, anyway, the "all other assets" clause is number seventeen on a list of items referred to by the contract as "the following assets of the Club and Holdco [the Patriots' holding company]."

Sullivan was selling his foottball related "antitrust claims" or, at the very least, "causes of action," we cannot find that Sullivan assigned the present antitrust claim to the buyers of the Patriots. *Gulfstream III Assocs., Inc. v. Gulfstream Aerospace Corp.*, 995 F.2d 425, 437-40 (3d Cir.1993); *see also Lerman v. Joyce Int'l, Inc.*, 10 F.3d 106, 112 (3d Cir.1993) (affirming requirement in *Gulfstream* that assignment of claim must be "express" but expanding definition of "express" language to include a grant of "all causes of action, claims and demands of whatsoever nature"). As no such express language appears in the contract for the sale of the Patriots, Sullivan did not transfer his interest in the present lawsuit to KMS Partiots when he sold the team.

The NFL's arguments concerning the application of § 1 of the Sherman Act to the facts of this case raise a substantial challenge to the jury verdict and are certainly weighty enough to give us pause. Upon careful consideration of the issues, however, we find Sullivan's theory of the case to be a plausible one and ultimately find the evidence sufficient to support it. For the foregoing reasons, therefore, we see no justification, as a matter of law, for ringing the death knell on this litigation.

IV. TRIAL ERRORS

Having reviewed those issues which would have warranted a judgment in favor of the NFL, had we decided any of those issues in the NFL's favor, we now turn to the NFL's claim that it is entitled to a new trial because of allegedly erroneous jury instructions and other trial errors. In particular, the NFL asserts that the district court failed to provide the jury with several crucial jury instructions that were required in order to present to the jury certain legal theories that were potentially dispositive of the verdict. The NFL argues that the court's failure to give the instructions was prejudicial error requiring a new trial.

Determining whether the failure to give proffered jury instructions is error depends on whether the instructions actually given to the jury, taken as a whole, adequately explained the law or whether they tended to confuse or mislead jury on the controlling issues of the case. *Davet v. Maccarone,* 973 F.2d 22, 26 (1st Cir.1992); *Transnational Corp. v. Rodio & Ursillo, Ltd.,* 920 F.2d 1066, 1070 (1st Cir.1990); *see also L.A. Coliseum,* 726 F.2d 1398 ("The question, then, is whether, viewing the jury instructions as a whole, the trial judge gave adequate instructions on each element of the case to insure that the jury fully understood the issues."). We must also consider whether the NFL's proposed instructions are accurate or misleading. *Shane v. Shane,* 891 F.2d 976, 987 (1st Cir.1989). "As long as the judge's instruction properly apprises the jury of the applicable law, failure to give the exact instruction requested does not prejudice the objecting party." *Brown v. Trustees of Boston Univ.,* 891 F.2d 337, 354 (1st Cir.1989), *cert. denied,* 496 U.S. 937, 110 S.Ct. 3217, 110 L.Ed.2d 664 (1990) (internal quotations omitted). A party, however, is entitled to have its legal theories on controlling issues, which are supported by the law and by the evidence, presented to the jury. *Jerlyn Yacht Sales, Inc. v. Roman Yacht Brokerage,* 950 F.2d 60, 68 (1st Cir.1991); *L.A. Coliseum,* 726 F.2d at 1398. An error in the jury instructions will warrant the reversal of the judgment and a new trial only if, upon review of the record as a whole, the error is determined to be prejudicial. *Davet,* 973 F.2d at 26; *Jerlyn Yacht Sales,* 950 at 69; *Transnational Corp.,* 920 F.2d at 1070.

In this case, we find that the failure to give certain instructions was prejudicial error [6] and we therefore vacate the judgment and order a new trial.

---

[6] The court's failure to instruct on the complete involvement defense was prejudicial error and, by itself, sufficient grounds for reversal and a new trial. We do not decide whether any of the other errors, standing alone, are prejudicial. We do hold, however, that all the errors taken together are prejudicial.

A. Equal Involvement Defense

The NFL argued before the district court that Sullivan was a complete and substantially equal participant in the NFL's ownership policy which he now challenges in the present lawsuit. As a result of Sullivan's involvement, the NFL claimed, Sullivan was barred from bringing a damages action under the antitrust laws pursuant to the "equal involvement defense" doctrine. The district court denied motions for summary judgment and a directed verdict on this issue and, further, refused to instruct the jury on the availability of the defense because it found that the evidence showed that Sullivan "had very little, if any, involvement in the formulation of [the public ownership] rule," and because the rule "was imposed on [Sullivan] by a preexisting National Football League rule." This ruling constituted prejudicial error because the "equal involvement defense" is an absolute defense to an antitrust claim and because the evidence warranted sending the issue to the jury.

A plaintiff's "complete, voluntary, and substantially equal participation" in an illegal practice under the antitrust laws precludes recovery for that antitrust violation. *CVD, Inc. v. Raytheon Co.*, 769 F.2d 842, 856 (1st Cir.1985), *cert. denied*, 475 U.S. 1016, 106 S.Ct. 1198, 89 L.Ed.2d 312 (1986); *General Leaseways, Inc. v. National Truck Leasing Ass'n*, 830 F.2d 716, 720-23 (7th Cir.1987); *THI-Hawaii, Inc. v. First Commerce Financial Corp.*, 627 F.2d 991, 995 (9th Cir.1980); *see also Bateman Eichler, Hill, Richards, Inc. v. Berner*, 472 U.S. 299, 310-11, 105 S.Ct. 2622, 2628-29, 86 L.Ed.2d 215 (1985) (applying equal involvement defense in securities law context). In order to establish an "equal involvement" defense, an antitrust defendant must prove, by a preponderance of the evidence, that the plaintiff bears at least substantially equal responsibility for an anticompetitive restriction by creating, approving, maintaining, continually and actively supporting, relying upon, or otherwise utilizing and implementing, that restriction to his

or her benefit.[7] *General Leaseways*, 830 F.2d at 720-26; *CVD*, 769 F.2d at 856. It is not essential to the defense that the plaintiff actually helped author or create the policy, although such facts would be highly probative, as long as the plaintiff was substantially responsible for maintaining and otherwise effectuating the policy. *See, e.g., General Leaseways*, 830 F.2d at 723 (applying equal involvement defense in case where plaintiff did not participate in the actual adoption of the policy although plaintiff was substantially involved in supporting, enforcing and maintaining the policy).[8] On the other hand, proof that the plaintiff benefitted from the challenged policy or failed to object to the policy, without more, is not sufficient to show "substantially equal participation." *See id.*, 830 F.2d at 725 (noting that "mere participation" in the challenged policy is not enough). Moreover, proof that the plaintiff was coerced ("economically" or

---

[7] The Supreme Court in *Bateman* added an additional requirement to the "equal involvement" defense: that "preclusion of suit would not significantly interfere with the effective enforcement of" the antitrust laws. *Bateman*, 472 U.S. at 311, 105 S.Ct. at 2629. We do not see a preclusion of Sullivan's damages action as presenting any significant interference with antitrust law enforcement. The NFL's policy is still subject to challenge under the antitrust laws. Because the equal involvement defense only precludes a damages action, Sullivan could have requested injunctive relief when the public ownership policy was allegedly preventing him from selling 49% of his team. In addition, other owners who were not involved in the adoption or support of the policy may still bring suit should they desire to sell ownership interests in their team to the public.

[8] To the extent this conflicts with the "but for" standard applied in *THI-Hawaii*, 627 F.2d at 995 (finding that "a plaintiff's recovery is not barred unless the illegal conspiracy would not have been formed *but for* its participation"), we decline to follow that portion of the case. There is no evidence of such a rigid "but for" requirement in the Supreme Court's formulation of the equal involvement defense in *Bateman*, 472 U.S. at 310-11, 105 S.Ct. at 2628-29 (finding the defense applies where "as a direct result of his own actions, the plaintiff bears at least substantially equal responsibility for the violations he seeks to redress").

otherwise) into supporting the policy, that the plaintiff attempted to oppose the illegal conduct, or that the plaintiff's participation was otherwise not voluntary, is highly probative of the absence of complete and equal involvement by the plaintiff in an antitrust violation. *E.g., CVD*, 769 F.2d at 856.

In this case, the evidence in the record was sufficient to support a jury instruction on the equal involvement defense. Sullivan was one of the three AFL members on the Joint Committee that established the policies, including the ownership policies, that were to govern the new expanded NFL. That Committee agreed, in a merger agreement signed by Sullivan, to adopt the NFL's policy against public ownership for the new NFL. Sullivan's son, Chuck, stated that Sullivan was the central figure in the merger negotiations. Sullivan subsequently relied on the NFL's public ownership policy to justify his purchase, through the merger of his team into a wholly owned company, of the outstanding stock of the Patriots in 1976. In the proxy statement for that transaction, Sullivan listed the NFL's policy against public ownership as one of the "Reasons for the Merger", and he attached a letter from the NFL justifying the public ownership policy and explaining that the continued presence of public stockholders conflicted with the interests of the league. Sullivan also affirmatively supported the policy in sworn testimony during the litigation with his former shareholders following the Patriots merger. Sullivan stated that the NFL's public ownership policy, and the justifications underlying the policy, were the reasons for his desire to purchase all outstanding shares of the team. There is no evidence that Sullivan ever opposed or objected to the ownership policy prior to the circumstances surrounding this case.

Taken together, this evidence is sufficient for a reasonable jury to conclude that Sullivan bears substantially equally responsibility for the NFL's public ownership policy because Sullivan helped adopt the policy, he relied

upon it, and he actively supported it. The jury, however, was never given an opportunity to consider this evidence in light of the equal involvement defense.

Sullivan claims that he was not at the meetings in which Lamar Hunt, the chairman of the AFL committee, agreed to the NFL's public ownership policy, and that he did not know in advance that the old NFL's public ownership rule would be adopted by the new NFL. Mr. Hunt himself testified, however, that he always spoke for the entire AFL committee at his various meetings with NFL owners, and that he discussed various negotiating points with the other AFL owners, including Sullivan, before any decisions were made. Moreover, Sullivan's own team obtained a specific waiver from the ownership policy, which, a reasonable jury could infer, indicates that Sullivan was involved in the decision to adopt the policy. In any event, it is the jury's responsibility to weigh the evidence and make a choice in circumstances like this where the same evidence supports two different yet reasonable conclusions.

The district court erred by failing to give the jury the opportunity to choose between these versions of the facts. The court's "finding" that Sullivan's involvement in the public ownership policy was minimal ignores evidence in the record. The court's view that the NFL imposed the ownership policy on the AFL owners, rendering their participation involuntary, is largely unsupported by the record. Ultimately, however, these are factual questions for the jury and none of the instructions provided by the district court served to adequately instruct the jury on this issue or send the issue to the jury. Therefore, the district court erred in refusing to give the NFL's proffered instruction on the "equal involvement" defense.

The error was prejudicial. By refusing to instruct the jury on the equal involvement defense, the district court deprived the NFL of a complete defense from Sullivan's lawsuit. The NFL presented facts that could have led to

a dismissal of the case if they were believed by a properly instructed jury. While the NFL could have highlighted, and in fact did highlight, some of the facts concerning Sullivan's support of, and reliance upon, the ownership policy in its closing argument before the jury, this effort was limited to the argument that the NFL's policy was "reasonable" for purposes of the rule of reason analysis. The NFL did not, and could not, argue to the jury that it should rule in favor of the NFL because Sullivan's participation in the adoption and maintenance of the public ownership policy was complete, voluntary and substantially equal. Without the proffered instruction, the jury had no occasion to consider whether Sullivan should be deprived of a damages remedy because of his involvement in the policy he now challenges. As a result, the district court's refusal to send the equal involvement defense to the jury was prejudicial error requiring a new trial.

B. Failure to Request an Official Vote of the Owners

As discusssed in Section II.C., above, in order to establish that the policy actually caused injury to himself, Sullivan must prove that the NFL effectively denied his request to waive or amend its policy against public ownership. While there is evidence that supports a finding that the NFL's policy effectively blocked Sullivan from pursuing his public offering, there is also sufficient evidence to support a contrary finding. Sullivan's failure to request a vote from the owners after he discovered that he was four votes shy of obtaining a waiver with seven owners still undecided, combined with former Commissioner Rozelle's testimony that he told Sullivan that Rozelle would put to the owners any plan that Sullivan wished, could support a finding that Sullivan was a "dormant plaintiff" who did not "spring into action" until it was "time to file suit." *Out Front*, 748 F.2d at 170. As such, a jury could conclude that the NFL did not prevent Sullivan from pur-

suing his stock sale, but instead, Sullivan simply dropped the idea for reasons unrelated to the NFL's policy. If the jury had reached such a conclusion, Sullivan would have failed to prove that his injury was caused by the antitrust policy, and judgment for the NFL would be required.

The NFL proposed instructions concerning Sullivan's failure to ask for a vote essentially stating that such a failure would result in judgment for the NFL if it was reasonable to require Sullivan to make such a request. The court refused to give the instruction because it felt that to do so would be to comment on the evidence, and the court did not want to comment on any of the evidence presented at trial. We understand the court's concern but believe that, under the facts of this case, there is a crucial point of law contained in the NFL's instruction that was not otherwise provided to the jury.

The jury was instructed generally on the issue of causation, but it was not told that it had to determine whether the NFL's policy against public ownership was actually enforced against Sullivan; that is, whether the policy, the alleged antitrust restraint, actually restrained Sullivan in any way from making a 49% public offering of his team. Although the NFL could, and did, argue that Sullivan's failure to ask for a vote was evidence that the policy did not cause injury to Sullivan, there was no legal hook upon which the jury could hang the NFL's argument. The failure of Sullivan to request a vote is a critical and potentially dispositive issue in this case. If the alleged restraint of trade does not even exist in practice, the whole case essentially disappears. Therefore, the jury should have been directed to make a specific finding as to whether the public ownership policy was enforced against Sullivan.

If the jury is instructed that Sullivan must prove that the NFL's policy was enforced against him, the jury will have cause to consider the crucial matter of whether the NFL actually enforced its policy against Sullivan or rather,

whether the NFL never had the chance to enforce its policy because Sullivan was never prepared to pursue his public offering. The instructions as proffered by the NFL may need to be tailored to avoid commenting on the evidence surrounding the "missing" vote by the NFL owners, but that does not excuse the court from giving no instruction at all on the issue. The failure to give some instruction concerning the failure of Sullivan to request a vote was error.

C. The Murray Option

In 1986, prior to Sullivan's decision to sell Patriots stock to the public, Sullivan sold Fran Murray an option to buy the entire club. The NFL took the position that the Murray option would have been an absolute bar to any public sale of Patriots stock and that Sullivan therefore could not prove causation. The NFL's position was supported by evidence introduced at trial. Sullivan proffered evidence that the option was not a bar to sale because the option would be bought out and because it could not be legally enforced. The issue of whether Murray could have, or would have, blocked a public offering by the Patriots was ultimately disputed.

The option agreement and Murray's deposition testimony were received into evidence. The district court, however, refused to admit Murray's statement that he would indeed have stopped any public stock sale of the Patriots from going forward if he had been told about it. The court found the testimony to be too speculative to be admissible. While the court's decision to exclude Murray's "speculative" testimony is well within the court's wide latitude of discretion in making such evidentiary rulings, *United States v. Abel*, 469 U.S. 45, 54, 105 S.Ct. 465, 470, 83 L.Ed.2d 450 (1984); *Doty v. Sewall*, 908 F.2d 1053, 1058 (1st Cir.1990), we note that Sullivan's entire case as to the causation of injury was equally speculative. Whether Sullivan's proposed stock sale could have pro-

ceeded and would have been successful in the absence of the NFL's public ownership policy was a matter of considerable conjecture. Fairness would seem to militate toward allowing the NFL to present its own version of the probable course of future events to counter Sullivan's theorizing.

In any event, the court's subsequent refusal to give the NFL's proffered jury instruction on the law of options, specifically the legal consequences of options under Massachusetts law, erroneously removed another crucial issue from the jury's purview. The Murray option was a key defense for the NFL, because if Sullivan did not have a legal right to sell Patriots stock to the public, he did not suffer any harm from the NFL's ownership policy and the NFL would have been entitled to judgment in its favor. Again, the NFL could make this argument to the jury, but the jury could still lack crucial information concerning the legal underpinnings of a crucial defense for the NFL.

Sullivan argues that the NFL's proposed instruction would have singled out one factual issue related to causation for the jury's special attention, something that would have unfairly prejudiced Sullivan. Sullivan adds that allowing the instruction would have generated countering instructions on other legal facets of option law that were relevant to Sullivan's position on the option issue and ultimately would have confused the jury. These arguments notwithstanding, we feel that, as long as suitable instructions are provided covering the basic legal points relevant to each party's arguments, the jury would not be unduly confused. Furthermore, the risk of prejudice from the instruction—due to the added attention afforded one of the NFL's defenses—is not sufficient to justify effectively depriving the NFL of a crucial defense. Ultimately, it was for the jury to decide whether the Murray option constituted an insurmountable obstacle to Sullivan's case on causation, and the district court's refusal to instruct on the law of options virtually removed this issue from consideration by the jury.

D. Balancing Procompetitive and Anticompetitive Effects in the Relevant Market

As we noted above, the rule of reason analysis requires a weighing of the injury and the benefits to competition attributable to a practice that allegedly violates the antitrust laws. *Monahan's Marine,* 866 F.2d at 526. The district court instructed the jury on its verdict form to balance the injury to competition in the relevant market with the benefits to competition in that same relevant market. The NFL protested, claiming that all procompetitive effects of its policy, even those in a market different from that in which the alleged restraint operated, should be considered. The NFL's case was premised on the claim that its policy against public ownership was an important part of the effective functioning of the league as a joint venture. Although it was not readily apparent that this beneficial effect applied to the market for ownership interests in NFL teams, the relevant market found by the jury, the NFL argued that its justification should necessarily be weighed by the jury under the rule of reason analysis. Sullivan responded, and the district court agreed, that a jury cannot be asked to compare what are essentially apples and oranges, and that it is impossible to conduct a balancing of alleged anticompetitive and procompetitive effects of a challenged practice in every definable market.

The issue of defining the proper scope of a rule of reason analysis is a deceptive body of water, containing unforeseen currents and turbulence lying just below the surface of an otherwise calm and peaceful ocean. The waters are muddied by the Supreme Court's decision in *NCAA*—one of the more extensive examples of the Court performing a rule of reason analysis—where the Court considered the value of certain procompetitive effects that existed outside of the relevant market in which the restraint operated. *NCAA*, 468 U.S. at 115-20, 104 S.Ct. at 2967-70 (considering the NCAA's interest in protecting live

attendance at untelevised games and the NCAA's "legitimate and important" interest in maintaining competitive balance between amateur athletic teams as a justification for a restraint that operated in a completely different market, the market for the telecasting of collegiate football games).[9] Other courts have demonstrated similar confusion. *See, e.g., L.A. Coliseum,* 726 F.2d at 1381, 1392, 1397, 1399 (stating that the "relevant market provides the basis on which to balance competitive harms and benefits of the restraint at issue" but then considering a wide variety of alleged benefits, and then directing the finder of fact to "balance the gain to interbrand competition against the loss of intrabrand competition", where the two types of competition operated in different markets).

To our knowledge, no authority has squarely addressed this issue. On the one hand, several courts have expressed concern over the use of wide ranging interests to justify an otherwise anticompetitive practice, and others have found particular justifications to be incomparable and not in correlation with the alleged restraint of trade. *Smith v. Pro Football, Inc.,* 593 F.2d 1173, 1186 (D.C.Cir.1978); *Brown v. Pro Football, Inc.,* 812 F.Supp. 237, 238 (D. D.C.1992); *Chicago Pro. Sports Ltd. Partnership v. National Basketball Ass'n,* 754 F.Supp. 1336, 1358 (N.D. Ill.1991). We agree that the ultimate question under the rule of reason is whether a challenged practice promotes or suppresses competition. Thus, it seems improper to validate a practice that is decidedly in restraint of trade

---

[9] The Supreme Court did not expressly consider the issue presented here. Therefore, it is impossible to tell whether the Court was consciously applying the rule of reason to include a broad area of procompetitive benefits in a variety of markets, or whether the Court was simply not being very careful and inadvertently extended the rule of reason past its proper scope. There is certainly no language, as Sullivan suggests, indicating that the Court was considering the alleged benefit of "competitive balance" only to the extent that it had procompetitive effects in the market for televised football games.

simply because the practice produces some unrelated benefits to competition in another market.

On the other hand, several courts, including this Circuit, have found it appropriate in some cases to balance the anticompetitive effects on competition in one market with certain procompetitive benefits in other markets. *See, e.g., NCAA*, 468 U.S. at 115-20, 104 S.Ct. at 2967-70; *Grappone, Inc. v. Subaru of New England, Inc.*, 858 F.2d 792, 799 (1st Cir.1988); *M & H Tire Co. v. Hoosier Racing Tire Corp.*, 733 F.2d 973, 986 (1st Cir.1984); *L.A. Coliseum*, 726 F.2d at 1381, 1392, 1397, 1399. Moreover, the district court's argument that it would be impossible to compare the procompetitive effects of the NFL's policy in the *inter*brand market of competition between the NFL and other forms of entertainment, with the anticompetitive effects of the *intra*brand market of competition between NFL teams for the sale of their ownership interests, is arguably refuted by the Supreme Court's holding in *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977). *Continental T.V.* explicitly recognized that positive effects on *inter*brand competition can justify anticompetitive effects on *intra*brand competition. *Id.* at 51-59, 97 S.Ct. at 2557-62. Although *Continental T.V.* can reasonably be interpreted as referring only to interbrand and intrabrand components of the *same relevant market*, *Hornsby Oil Co., Inc v. Champion Spark Plug Co.*, 714 F.2d 1384, 1394 (5th Cir.1983), there is also some indication that interbrand and intrabrand competition necessarily refer to distinct, yet related, markets. *Continental T.V.*, 433 U.S. at 52 n. 19, 97 S.Ct. at 2558 n. 19 ("The degree of intrabrand competition is wholly independent of the level of interbrand competition."). Arguably, the market put forward by the NFL—that is the market for NFL football in competition with other forms of entertainment—is closely related to the relevant maket found by the jury such that the procompetitive benefits in one can be compared to the anticompetitive harms in the other. Clearly this question

can only be answered upon a much more in-depth inquiry that we need not, nor find it appropriate to, embark upon at this time.

Finally, we note that although balancing harms and benefits in different markets may be unwieldly and confusing, such is the case with a number of balancing tests that a court or jury is expected to apply all the time. Indeed, Justice Brandeis' famous formulation of the rule of reason seems to contemplate the balancing of a wide variety of factors and considerations, many of which are not necessarily comparable or correlative:

> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

Board of Trade of the City of Chicago v. United States, 246 U.S. 231, 238, 38 S.Ct. 242, 244, 62 L.Ed 683 (1918).

Although the issue of the proper scope of the rule of reason analysis is more appropriately resolved in a case where its it dispositive and more fully briefed, we can draw at least one general conclusion from the caselaw at this point: courts should generally give a measure of latitude to antitrust defendants in their efforts to explain the procompetitive justifications for their policies and practices; however, courts should also maintain some vigilance by excluding justifications that are so unrelated to the challenged practice that they amount to a collateral at-

tempt to salvage a practice that is decidedly in restraint of trade.

In any event, we need not enter these dangerous waters to resolve the instant dispute. The NFL wanted the jury to consider its proffered justifications for the public ownership policy—namely that the policy enhanced the NFL's ability to effectively produce and present a popular entertainment product unimpaired by the conflicting interests that public ownership would cause. These procompetitive justifications should have been considered by the jury, even under Sullivan's theory of the proper scope of the rule of reason analysis. As we point out in note [4] above, and as Sullivan himself points out, to the extent the NFL's policy strengthens and improves the league, resulting in increased competition in the market for ownership interests in NFL clubs through, for example, more valuable teams, the jury may consider the NFL's justifications as relevant factors in its rule of reason analysis. The danger of the proffered instructions on the verdict form is that they may have mislead the jury into thinking that it was precluded from considering the NFL's justifications for its ownership policy. Therefore, the relevant market language on the verdict form should be removed, or else the jury should be informed that evidence of benefits to competition in the relevant market can include evidence of benefits flowing indirectly from the public ownership policy that ultimately have a beneficial impact on competition in the relevant market itself.

E. References to Prior Antitrust Cases Against the NFL

Despite a pretrial motion *in limine* and repeated objections by the NFL, the district court allowed the jury to hear numerous references to prior antitrust cases against the NFL. Evidence about prior antitrust violations by the defendant may, in appropriate cases, be admissible to show things like market power, intent to monopolize, motive, or method of conspiracy. *United States Football League*

v. National Football League, 842 F.2d 1335, 1371 (2d Cir.1988) (hereinafter "*USFL*"). Because of the inherently prejudicial nature of such evidence, however, evidence of prior antitrust cases involving the NFL are only admissible if Sullivan can demonstrate that the conduct underlying those prior judgments had a direct, logical relationship to the conduct at issue in the present case. *USFL*, 842 F.2d at 1371; *International Shoe Mach. Corp. v. United Shoe Mach. Corp.*, 315 F.2d 449, 454 (1st Cir.), *cert. denied*, 375 U.S. 820, 84 S.Ct. 56, 11 L.Ed.2d 54 (1963) (plaintiff must show "that his claimed injury stemmed directly and proximately from the same type of practice condemned in the prior Government action"); *see also Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338, 1351 (3d Cir.1975). In many of the instances where Sullivan or his counsel made references to prior antitrust cases at trial, Sullivan failed to satisfy this burden.

Sullivan argues that the prior cases were relevant either to certain testimony regarding the reasonableness of the NFL's ownership policy and voting requirements or to the issue of defining the relevant market. Because none of the cases mentioned at trial concerned the NFL's ownership policy at issue here, evidence of those prior cases is not relevant to the reasonableness of the NFL's policy against public ownership. The general voting requirements are not in dispute, so cases touching solely upon them are also not relevant. Certain limited portions of some prior antitrust decisions are relevant to the issue of defining the relevant market. The testimony and commentary at trial concerning these prior cases, however, was not limited to the relevant market portions of these cases and, on the contrary, focussed primarily on the issue of whether the NFL's public ownership policy was unreasonable. As such, that evidence was prejudicial, without any balancing relevance to justify its admission into evidence.

The references to prior NFL cases were made in a number of different contexts during the trial (including during

direct examination, cross-examination, and at closing argument), and they containned a variety of different information. These references are not likely to be repeated in precisely the same context upon a new trial. Therefore, instead of identifying which particular pieces of evidence were inadmissible, we think it would be more useful to point out more generally that references to prior NFL cases are not relevant to the issue of the reasonableness of the NFL's public ownership policy and such references should be excluded if they contain information about the unreasonableness of other policies of the NFL which were at issue in the other cases.

Reversed and remanded.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civ. A. Nos. 92-10592-H, 92-10915-H

WILLIAM H. SULLIVAN, JR.,
Plaintiff,

v.

PAUL TAGLIABUE, *et al.*,

CHARLES W. SULLIVAN,
Plaintiff,
Defendants.

PAUL TAGLIABUE, *et al.*,
Defendants.

July 30, 1992

ORDER

HARRINGTON, District Judge.

After hearing oral argument, the Court denies Defendants' Motions to Dismiss the above-entitled cases.

The issue presented by these cases is whether the National Football League's rule which prohibits the sale of shares of interest in an National Football League franchise to any company not engaged in the business of professional football can be viewed as a restraint on trade in violation of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2).

The Sherman Act, 15 U.S.C. § 1, is applicable to professional sports leagues and teams, including professional football teams and their owners. *North American Soccer*

v. National Football League, 670 F.2d 1249, 1257 (2d Cir.1982); *Los Angeles Memorial Coliseum Com'n v. National Football League*, 726 F.2d 1381, 1390 (9th Cir. 1984). These cases establish that agreements entered into between professional football owners restricting the right of a fellow owner to engage in "cross ownership" in a separate sport and to relocate his team to another city, respectively, are justiciable under the Sherman Act. The instant cases involve the allegation that an agreement entered into between professional football owners restricting the right of a fellow owner to sell shares of interest in his team violates the Sherman Act. The *North American Soccer* case, the *Los Angeles Memorial Coliseum Com'n* case and the instant cases present a similar issue, namely, to what extent a group of businessmen can enforce an agreement with one of their co-contractors to the detriment of that co-contractor's right to conduct his business in the manner in which he pleases.

To establish a cause of action under the Sherman Act, plaintiffs must allege and prove three essential elements: (1) an agreement among two or more persons or distinct business entities; (2) which is intended to harm or unreasonably restrain competition; (3) and which actually causes injury to competition. *Kaplan v. Burroughs Corp.*, 611 F.2d. 286, 290 (9th Cir. 1979), *cert. denied*, 447 U.S. 924, 100 S.Ct. 3016, 65 L.Ed.2d 1116 (1980); *accord Reid Brothers Logging Co. v. Ketchikan Pulp Co.*, 699 F.2d 1292, 1296 (9th Cir.1983). The three essential elements have been pleaded in both cases.

The Plaintiff William Sullivan was the founder and sole or managing owner of the New England Patriots professional football franchise from 1960 to 1988. He alleges that "[f]or many years prior to 1986 and continuing to the date of this complaint, the defendants created and selectively enforced a rule which prohibited the sale, in whole or in part, of the shares of interest of an NFL franchise to any company not engaged in the business of

professional football. The rule could be changed or waived only by a vote of three quarters of the NFL owners . . ."

The plaintiff further alleges that the intended effect of the rule was, in part:

> to assist the defendants to acquire and maintain a monopoly in the business of professional football; . . . to exclude competitive entry into the business of professional football by commercial companies . . . ; . . . to prevent football fans and members of the community from acquiring a "rooter's share" of a professional football team . . . ; to prevent owners of franchises desiring to sell all or part of their interest from securing a competitive market price since competition from all of corporate America was not only impaired but completely foreclosed; to deny to owners access to potential buyers best in position to afford the highest market price for all or part of the shares or interest; and to foreclose virtually all competition for the sale or purchase of all or part of an NFL franchise.

The plaintiff claims that the enforcement of the league rule which prohibited the sale of 49 percent of the franchise to a group of investors, who were not engaged in the business of professional football, has "directly caused injury to the plaintiff by denying him access to a competitive market place that would have saved 51 percent of his franchise." In other words, the Plaintiff William Sullivan alleges that the rule limited his ability to raise the capital necessary to maintain a profitable franchise and to thereby compete with the other football franchises.

The Plaintiff Charles W. Sullivan was a Vice President of the New England Patriots professional football franchise from 1975 to 1988. Charles Sullivan was the owner of all shares of the corporate entity known as Stadium Management Corporation, a Massachusetts corporation, that formerly owned Sullivan Stadium in Foxboro, Mass-

achusetts. Stadium Management Corporation went into bankruptcy in 1988 and Charles Sullivan subsequently received an assignment of all causes of action or claims owned by the corporation. Charles Sullivan sues in his individual capacity and as the assignee of these claims.

The Plaintiff Charles Sullivan claims that the enforcement of the rule which bars the sale of a franchise to any company not engaged in the business of professional football blocked the refinancing of the stadium. Charles Sullivan claims that due to the defendants blocking the refinancing the Plaintiff Charles Sullivan suffered the following losses:

1. The enhanced market value of the stadium, if the planned renovation had been completed.
2. The enhanced market value of the stadium resulting from a lease extension with the Patriots which would have occurred if the stadium had been renovated.
3. The enhanced market value of a renovated stadium to promoters for other entertainment and sports events.

In other words, the Plaintiff Charles Sullivan alleges that the rule interfered with his ability to refinance Sullivan Stadium and to thereby compete with other stadia in attracting other sports events and other entertainment.

Because restrictive agreements between members of a joint venture, such as members of a football league, can under some circumstances have legitimate purposes as well as anticompetitive effects, they are subject to scrutiny under the rules of reason. *Standard Oil Co. v. United States*, 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619 (1911). *North American Soccer v. National Football League, supra*, at 1259.

The Court in *Los Angeles Memorial Coliseum Com'n v. National Football League, supra*, held that the rule of reason, under which restraints of trade are analyzed

under federal antitrust law, requires the *fact finder* to decide whether, under all the circumstances of the case, the agreement imposes an unreasonable restraint on competition. The Court stated, on page 1391, that the "[r]ule of reason analysis calls for a 'thorough investigation of the industry at issue and a balancing of the arrangement's positive and negative effects on competition.' "

The instant case would "entail an inquiry into 'whether the challenged agreement is one that promotes competition or one that suppresses competition.' " *North American Soccer v. National Football League, supra*, at 1259, *quoting National Society of Professional Engineers v. United States*, 435 U.S. 679, 691, 98 S.Ct. 1355, 1365, 55 L.Ed.2d 637 (1978).

Whether an agreement between owners of teams in a professional football league violates the antitrust law requires an in-depth investigation of the business practices of a particular and highly unique industry and a detailed analysis of its findings to determine whether such an agreement among the competitors involved in that industry promotes or reduces competition. A decision based on such complex financial and economic factors cannot be rendered as a matter of law upon a Motion to Dismiss, but only by a fact finder after a full evidentiary exploration of such factors.

SO ORDERED.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No.: 92-10592-H

WILLIAM H. SULLIVAN, JR.,
Plaintiff,

v.

PAUL TAGLIABUE, *et al.*,
Defendants.

Civil Action No.: 92-10915-H

CHARLES W. SULLIVAN,
Plaintiff,

v.

PAUL TAGLIABUE, *et al.*,
Defendants.

ORDER

July 15, 1993

HARRINGTON, D.J.

After hearing on Motions, the Court rules as follows:

1. Defendants' Motion for Summary Judgment on Plaintiff William Sullivan's Claims is denied;

2. Defendants' Motion for Summary Judgment on Plaintiff Charles Sullivan's Claims is allowed on the ground that the Plaintiff Charles Sullivan does not com-

ply with the requirements of antitrust standing and therefore is not entitled to sue under the antitrust laws. *See Associated General Contractors of California, Inc. v. California State Council of Carpenters, et al.*, 769 U.S. 842 (1983). This Court declines to exercise pendent jurisdiction with respect to the state law claims and hereby dismisses same. A Memorandum is to follow.

3. Defendants' Motion for Summary Judgment on Behalf of Paul Tagliabue and Peter Rozelle is denied;

4. Defendants' Motion to Strike Portions of the Affidavits of William Sullivan, Charles Sullivan and Patrick Sullivan is denied;

5. Motion for Reconsideration of Magistrate's Rulings of June 28, 1993 Denying Plaintiffs' Motion to Compel the Production of Documents is denied; and

6. Defendants' Motion for Dismissal Pursuant to Rule 37(b)(2)(C) or Such Other Relief as the Court May Deem Appropriate is denied at this time. Defendants may renew said Motion prior to the trial of this case.

SO ORDERED.

/s/ Edward F. Harrington
EDWARD F. HARRINGTON
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No.: 92-10592-H

WILLIAM H. SULLIVAN, JR.,
Plaintiff,

v.

NATIONAL FOOTBALL LEAGUE and MEMBERS OF THE NATIONAL FOOTBALL LEAGUE,
Defendants.

ORDER

October 4, 1993

HARRINGTON, D.J.

After hearing on Defendants' Motion for a Directed Verdict at the close of the Plaintiff Sullivan's case, the Court rules as follows:

1. The Court grants all Defendants' Motions as to Counts II, III, IV and V;

2. The Court grants Defendant Tagliabue's and Defendant Rozelle's Motions as to Count I; and

3. The Court grants Defendant National Football League's and Defendant Members of the National Football League's Motions limited to that portion of Count I alleging a violation of Section 2 of the Sherman Act only.

As a result of this action, there remains for resolution in this case Plaintiff Sullivan's allegations contained in

Count I against the Defendant National Football League and the Defendant Members of the National Football League charging a violation of Section 1 of the Sherman Act.

SO ORDERED.

/s/ Edward F. Harrington
EDWARD F. HARRINGTON
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No.: 92-10592-H

WILLIAM H. SULLIVAN, JR.,
Plaintiff

v.

NATIONAL FOOTBALL LEAGUE and MEMBERS OF THE NATIONAL FOOTBALL LEAGUE,
Defendants.

ORDER

November 18, 1993

HARRINGTON, D.J.

After review of Defendants' Motion for Judgment Notwithstanding the Verdict or, in the alternative, Motion for New Trial and Plaintiff's Opposition thereto, the Court rules as follows:

1. The Court denies the Defendants' Motion for Judgment Notwithstanding the Verdict.

2. The Court finds that the Plaintiff Sullivan has established by a preponderance of the evidence that the National Football League's Rule 3.5 relating to Transfer of Membership and the National Football League's Policy against Public Ownership constituted an unreasonable restraint on competition in the relevant market, and, thus, denies Defendants' Motion for New Trial on the issue of liability.

3. The Court orders a hearing on the question whether the jury's finding that the National Football League's Rule 3.5 relating to Transfer of Membership and the National Football League's Policy against Public Ownership materially caused the Plaintiff Sullivan to be injured in his business, the New England Patriots, was against the weight of the evidence, and, thus, whether Defendants' Motion for New Trial on the Issue of causation should be granted.

4. The Court orders a hearing on the question whether the jury's finding of the actual amount of money necessary to compensate the Plaintiff Sullivan for injury to his business caused by the National Football League's Rule 3.5 relating to Transfer of Membership and the National Football League's Policy against Public Ownership was against the weight of the evidence, and, thus, whether Defendants' Motion for New Trial on the issue of damages should be granted.

5. The Court also orders a hearing on the question whether the Court should condition any denial of Defendants' Motion for New Trial on the issue of damages on the Plaintiff Sullivan's accepting a remittitur of the damages found by the jury on the ground that the jury's finding of actual damages was excessive.

SO ORDERED.

/s/ Edward F. Harrington
EDWARD F. HARRINGTON
United States District Judge

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 94-1031

WILLIAM H. SULLIVAN, II,
Plaintiff-Appellee,

v.

PAUL TAGLIABUE, *et al.*,
Defendants-Appellees (sic).

NATIONAL FOOTBALL LEAGUE, &
MEMBERS OF THE NATIONAL FOOTBALL LEAGUE
Defendants-Appellants.

Before

Torruella, *Chief Judge,*
Coffin, *Senior Judge,*
Stahl, *Circuit Judge.*

ORDER OF THE COURT

Entered October 26, 1994

The appellants Petition for Rehearing, filed on September 29, 1994 is hereby *denied.*

The opinion of this Court issued on September 16, 1994, is amended as follows:

1. On page 22, first paragraph, last sentence: Replace the citation "*see also SCFC ILC, Inc.* v. *Visa U.S.A. Inc.*, 819 F. Supp. 956, 979-80 (D. Utah 1993) (finding that the existence of a joint venture may save a restraint from *per se* illegality but not from the normal rule of reason scrutiny)." with "*cf. SCFC ILC, Inc.* v. *Visa U.S.A. Inc.*, 1994 U.S. App. LEXIS 26849, *19, (10th Cir. Sept. 23, 1994) (rejecting arguments that joint ventures require a "special" rule of reason review, but finding no violation of Section 1 on the specific facts of the case)."

2. On page 22, second paragraph, last full sentence: Replace sentence "The record contains evidence of a clearly less restrictive alternative to the NFL's ownership policy that would yield the same benefits as the current policy" with "The record contains evidence of a less restrictive alternative to the NFL's ownership policy that may yield the same benefits as the current policy."

3. On page 23, last paragraph in section B. After the last sentence in the paragraph, insert the sentence "Whether this proposed amendment is indeed a less restrictive, equally beneficial policy, is a jury question we need not reach here. We merely point to it as one factor a jury may consider in its rule of reason analysis."

Judge Boudin did not participate in the issuance of this order.

By the Court:

/s/ Francis P. Scigliano
Clerk.

(2)

SUPREME COURT, U.S.
FILED
JAN 9 1995
OFFICE OF THE CLERK

No. 94-1048

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

NATIONAL FOOTBALL LEAGUE, *et al.*,
Petitioners,

v.

WILLIAM H. SULLIVAN, JR.,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

---

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

FREDERICK P. FURTH*
DANIEL S. MASON
BRUCE J. WECKER
MICHAEL P. LEHMANN
FURTH, FAHRNER & MASON
201 Sansome St., Ste. 1000
San Francisco, CA 94104
(415) 433-2070

JOSEPH L. ALIOTO
ANGELA M. ALIOTO
LAW OFFICES OF JOSEPH L. ALIOTO
650 California St., 25th Floor
San Francisco, CA 94108
(415) 434-2100

ALAN R. HOFFMAN
LYNCH, BREWER, HOFFMAN & SANDS
101 Federal St., 22nd Floor
Boston, MA 02110
(617) 951-0800

Counsel for Respondent

*Counsel of Record

January 9, 1995

32

QUESTIONS PRESENTED

1. In assessing under the Rule of Reason the legality of a restraint of trade that is allegedly ancillary but not essential to the legitimate activities of a monopolistic joint venture, can the factfinder take into account less restrictive alternatives to the restraint that would provide similar benefits?

2. Should the National Football League--an unincorporated association of 28 separately owned professional football clubs, each of which is independently operated through a distinct corporation or partnership, and all of which compete for players, coaches, and the like--be deemed a single enterprise with respect to an alleged conspiracy to prevent respondent from selling ownership interests in his member club to members of the public in order to acquire additional capital?

PARTIES TO THE PROCEEDING

Petitioners, who were defendants below, are the National Football League and twenty-one of its twenty-eight member clubs.* Respondent-plaintiff is William H. Sullivan, Jr.

---

* Petitioner-defendant members of the National Football League own franchises in the following cities and areas: Atlanta (The Five Smiths, Inc.), Buffalo (Buffalo Bills, Inc.), Chicago (Chicago Bears Football Club, Inc.), Cincinnati (Cincinnati Bengals, Inc.), Cleveland (Cleveland Browns, Inc.), Dallas (Dallas Cowboys Football Club, Ltd.), Denver (PDB Sports Ltd.), Detroit (The Detroit Lions, Inc.), Green Bay (Green Bay Packers, Inc.), Houston (Houston Oilers, Inc.), Indianapolis (Indianapolis Colts, Inc.), Los Angeles (Rams) (Los Angeles Rams Football Co.), Minneapolis (Minnesota Vikings Football Club, Inc.), New Orleans (New Orleans Saints, Ltd.), New York (Jets) (New York Jets Football Club, Inc.), Phoenix (B&B Holdings, Inc.), Pittsburgh (Pittsburgh Steelers Sports, Inc.), San Diego (Chargers Football Co.), Seattle (Seattle Professional Football Club, Inc.), Tampa Bay (Tampa Bay Area NFL Football, Inc.), and Washington, D.C. (Pro-Football, Inc.).

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

OPINIONS BELOW 1

JURISDICTION 2

STATUTE INVOLVED 2

STATEMENT OF THE CASE 2

I. FACTUAL BACKGROUND OF THE CASE 3

II. THE PRESENT LAWSUIT AND THE ISSUES RAISED BELOW 4

A. History Of The Lawsuit 4

B. Consideration Below Of The "Less Restrictive Alternative" Issue 5

C. Consideration Below Of The Single Enterprise Issue 8

REASONS FOR DENYING THE PETITION 9

I. LEGAL FRAMEWORK ESTABLISHED BY THIS COURT'S PRECEDENTS 9

Page

II. THE FIRST CIRCUIT DID NOT UTILIZE A "LEAST RESTRICTIVE ALTERNATIVE" ANALYSIS AND THE ANALYSIS IT DID USE IS CONSISTENT WITH THE LAW OF THIS COURT AND OTHER CIRCUITS 12

III. THE FIRST CIRCUIT'S RULING ON THE SINGLE ENTERPRISE DEFENSE IS CONSISTENT WITH PRECEDENT 16

CONCLUSION 22

TABLE OF AUTHORITIES

Cases	Page(s)
Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970)	12
Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332 (1982)	9
Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. 1 (1979)	9,10
Brown v. Pro-Football, Inc., 1992-1 Trade Cas. (CCH) ¶69,747 (D.D.C. 1992) (appeal pending)	17
Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918)	10
Chicago Professional Sports Ltd. Partnership v. National Basketball Ass'n, 961 F.2d 667 (7th Cir.), *cert. denied*, 113 S.Ct. 409 (1992)	13,19
Citizens Pub. Co. v. United States, 394 U.S. 131 (1969)	9
City of Mt. Pleasant v. Associated Elec. Coop., 838 F.2d 268 (8th Cir. 1988)	18,20
Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984)	8,17,21
Delta Air Lines, Inc. v. August, 450 U.S. 346 (1981)	12
Federal Trade Comm'n v. Indiana Fed'n of Dentists, 476 U.S. 447 (1986)	10

Image Technical Servs., Inc. v. Eastman Kodak Co., 903 F.2d 612 (9th Cir. 1990), *aff'd*, 504 U.S. ___, 112 S.Ct. 2072 (1992) 13

Kapp v. NFL, 390 F.Supp. 73 (N.D.Cal. 1974), *aff'd in part and rev'd in part*, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907 (1979) 17

Los Angeles Memorial Coliseum Comm'n v. NFL, 726 F.2d 1381 (9th Cir.), *cert. denied*, 469 U.S. 990 (1984) 11,13,17

Mackey v. NFL, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977) 17

McNeil v. NFL, 1992-2 Trade Cas. (CCH) ¶69,982 (D.Minn. 1992) 18

McNeil v. NFL, 790 F.Supp. 871 (D.Minn. 1992) 17,18,19-20

Mid-South Grizzlies v. NFL, 550 F.Supp. 558 (E.D.Pa. 1982), *aff'd*, 720 F.2d 772 (3d Cir. 1983), *cert. denied*, 467 U.S. 1215 (1984) 17

National Collegiate Athletic Ass'n v. Board of Regents of Univ. of Okla., 468 U.S. 85 (1984) 10,16,20

National Soc'y of Professional Engineers v. United States, 435 U.S. 679 (1978) 10,11,16

NFL v. North American Soccer League, 459 U.S. 1074 (1982) 11

North American Soccer League v. NFL, 670 F.2d 1249 (2d Cir.), *cert. denied*, 459 U.S. 1074 (1982) 13,17

Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284 (1985) 10

Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1033 (1987) 13,14,15

SCFC ILC, Inc. v. VISA USA, Inc., 36 F.3d 958 (10th Cir. 1994) 13,14

Sisson v. Ruby, 497 U.S. 358 (1990) 12

Smith v. Pro Football, Inc., 593 F.2d 1173 (D.C. Cir. 1978) 13,17

Sullivan v. NFL, 34 F.3d 1091 (1st Cir. 1994) 1,6,9,11,12 14,15,20

Sullivan v. Tagliabue, 795 F.Supp. 56 (D.Mass. 1992) 1

Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951) 9

United States v. McCaskey, 9 F.3d 368 (5th Cir. 1993), *cert. denied*, 114 S.Ct. 1565 (1994) 16

United States v. NFL, 116 F.Supp. 319 (E.D.Pa. 1953) 17

United States v. Realty Multi-List, Inc., 629 F.2d 1351 (5th Cir. 1980) 13

United States v. Sealy, Inc., 388 U.S. 350 (1967) 9

United States v. Topco Assocs., 405 U.S. 596 (1972) 9

United States Football League v. NFL, 644 F.Supp. 1040 (S.D.N.Y. 1986), *aff'd*, 842 F.2d 1335 (2d Cir. 1988) 14

United States Trotting Ass'n v. Chicago Downs Ass'n, Inc., 665 F.2d 781 (7th Cir. 1981) 13,19

Volvo North America Corp. v. Men's Int'l Professional Tennis Council, 857 F.2d 55 (2d Cir. 1988) 20

Rules, Codes and Statutes

15 U.S.C. §1 2,4,17,18,19,21
§2 4,9

28 U.S.C. §1254(1) 2
§1331 2
§1337 2

Other Authorities

VII PHILLIP E. AREEDA, ANTITRUST LAW (1986) 11,15,18,21

Maxwell Blecher and Howard Daniels, *Professional Sports And The "Single Entity" Defense Under Section One Of The Sherman Act*, 4 Whittier L.Rev. 217 (1982) 20

ROBERT BORK, THE ANTITRUST PARADOX 279 (1978) 15

Lee Goldman, *Sports, Antitrust, and The Single Entity Theory*, 63 Tulane L. Rev. 751 (1989) 20,21

Drew Krause, *The National Football League's Ban on Corporate Ownership: Violating Antitrust To Preserve Traditional Ownership--Implications Arising From William H. Sullivan's Antitrust Suit*, 2 Seton Hall J. of Sports Law 175 (1992) 15

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

No. 94-1048

NATIONAL FOOTBALL LEAGUE, *et al.*,
Petitioners,

v.

WILLIAM H. SULLIVAN, JR.,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

---

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent William H. Sullivan, Jr. opposes the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case filed by petitioners, the National Football League ("NFL" or "league") and the 21 of its member clubs named as parties.

OPINIONS BELOW

The opinion of the court of appeals is reported at 34 F.3d 1091 and appears in Appendix A to the petition. The decision of the district court denying the motion to dismiss is reported at 795 F.Supp. 56 and

appears in Appendix B to the petition. The decisions of the district court denying the motions for summary judgment, directed verdict, and judgment as a matter of law appear in Appendices C, D, and E, respectively, to the petition.

JURISDICTION

The judgment of the court of appeals is dated September 16, 1994. A petition for rehearing was filed by the petitioners on September 30, 1994 and was denied on October 26, 1994, in an order that made changes to the court's original opinion. *See* Appendix F to the petition.

Jurisdiction in the district court was premised upon 28 U.S.C. §§1331 and 1337. Jurisdiction in this Court is based on 28 U.S.C. §1254(1).

STATUTE INVOLVED

Section 1 of the Sherman Act (15 U.S.C. §1) provides, in pertinent part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

STATEMENT OF THE CASE

Petitioners have identified two legal issues of purportedly controlling importance here: (1) whether the First Circuit erred in allegedly applying a "least restrictive alternatives" analysis to the allegedly ancillary restraint of trade imposed by the NFL that is being challenged and (2) whether the First Circuit erred in refusing to treat the NFL and its member clubs as a single enterprise incapable of conspiring with respect to that restraint. "Petition For A Writ of Certiorari," pp. 10-11 (Dec. 1994) ("Pet."). The first of these issues was raised neither in the district court nor in the court of appeals. Moreover, the analysis applied by both courts was significantly different from what petitioners now claim and is consistent with both the decisions of this Court and precedent from other circuits. The second issue was conceded by the NFL at the trial level and raised for the first time in the court of

appeals. That court rejected the NFL's single enterprise contention, and its rejection is consistent with the rulings of other courts that have had to consider the application of the antitrust laws to the league. In refusing to accept this argument, the First Circuit relied on the very opinion of the Eighth Circuit that petitioners now claim creates a split of authority.

In order to fairly analyze petitioners' arguments, it is necessary to consider at greater length the factual background to this lawsuit. It is also necessary to consider in detail what the lower courts actually did (and did not do) with respect to the two issues presented and to consider in detail what arguments petitioners made (and did not make) below concerning those issues.

I. FACTUAL BACKGROUND OF THE CASE.

This case involves an antitrust challenge by the former owner of the New England Patriots ("Patriots") football club to the NFL's uncodified policy banning entirely public ownership of member franchises, including ownership by public corporations. The Patriots had formerly been a member of the old American Football League ("AFL"), which had no restriction against public ownership.[1] Joint Appendix to the First Circuit ("J.A.") 451-52, 504. From 1960 to 1976, the club was publicly owned. *Id.* In 1976, respondent bought out the public shareholders, partly at the behest of NFL officials. *See* Exh. 1233 at 5. The publicly-owned status of the Patriots had been "grandfathered" as an exception to the public ownership ban when the AFL merged into the NFL in 1966, subject to the understanding that the club would eventually be brought into compliance with the league's policy. J.A. 469, 567; S.A. 108.

In December of 1986, the Boston Celtics professional basketball club made a public offering of 2.6 million limited partnership units at $18.50 per share. Exh. 1108. Respondent desired to do something similar by making a public offering of 49 percent of the Patriots and therefore raised the issue of modifying the NFL's public ownership ban

---

[1] Nor do other major professional sports leagues--such as the National Basketball Association or Major League Baseball--have rules barring public ownership of major franchises. Joint Appendix to the First Circuit ("J.A.") 496-97; Supplemental Appendix to the First Circuit ("S.A.") 92-93, 213-14; Trial Exhibit ("Exh.") 1108 at 9.

at a league meeting held in October of 1987. At that meeting, respondent expressed support for a proposal previously presented by another NFL club owner that would permit public corporations to own stock in NFL teams. *See* Exh. 12. He also presented an alternative modification that read as follows:

> "A member club may transfer not more than 49% of its outstanding equity by means of a sale to the public of units in a master limited partnership or stock in a corporation, providing that any future transactions relating to the remaining control units in the limited partnership or control shares in the corporation would continue to be subject to the provisions of Article III of the Constitution and By-Laws." (Exh. 33 at 00000833.)

Discussion of these proposals was tabled at the October league meeting. Exhs. 33, 33A, 1801, 1805. Respondent thereafter sought to obtain the votes of 21 of the NFL's 28 club owners for his proposed modifications, in accordance with Article 3.5 of the NFL's constitution and bylaws, which requires that three-fourths of the members of the league approve any transfers of ownership of, or ownership interests in, a member club. Respondent was unable to obtain the requisite supermajority and former NFL Commissioner Pete Rozelle indicated that he would not support and might oppose the proposals and that any continuing efforts to change the league's ban on public ownership were futile. J.A. 610, 659-60; Exh. 36. Respondent sold the Patriots in October of 1988 for approximately $83.7 million, less than the team's true worth, especially in a market that included public investors. The NFL's policy thus prevented respondent from maintaining a majority share of a rapidly appreciating asset. In 1994, the Patriots were sold for a reported $165 million, then the highest price ever paid for an NFL club.

II. THE PRESENT LAWSUIT AND THE ISSUES RAISED BELOW.

A. History Of The Lawsuit.

Respondent filed the present lawsuit in May of 1991, alleging that the NFL's public ownership ban and the steps taken to enforce it violated Sections 1 and 2 of the Sherman Act (15 U.S.C. §§1, 2), as

well as state law. The suit was brought against the present petitioners, as well as former NFL Commissioner Pete Rozelle and present NFL Commissioner Paul Tagliabue. After denying motions to dismiss and for summary judgment, the district court for the District of Massachusetts (the Honorable Edward F. Harrington, Jr.) conducted a jury trial in September and October of 1993 that extended for 22 court days. At that trial, the district court granted a directed verdict for the individual defendants. It also granted a directed verdict of respondent's state law claims and on the monopolization claim, believing that the latter was surplusage in light of the antitrust conspiracy claim.

The jury found that the NFL's ban on public ownership was unreasonable, and had caused injury to the respondent in the amount of $38 million before trebling. In post-trial proceedings, the district court denied motions for judgment notwithstanding the verdict and for a new trial, but remitted the damage award to $17 million. On appeal, in a unanimous opinion authored by Chief Judge Juan Torruella, the First Circuit reversed and remanded the case for a new trial. The appellate court ruled that petitioners were not entitled to judgment as a matter of law, but found that the trial court's failure to give a particular jury instruction constituted reversible error, in conjunction with other errors.

B. Consideration Below Of The "Less Restrictive Alternative" Issue.

It is important to consider the extent to which the petitioners raised below the issues now being presented to this Court. Petitioners did proffer an instruction on joint ventures generally, but never offered one explaining the ancillary restraint doctrine. The district court instructed the jury as follows on the balancing to be undertaken pursuant to the Rule of Reason:

> "If the beneficial effects of the restraint outweigh the harmful effects, or if the net effect on competition is harmful but insubstantial, the contract is not unreasonable or unlawful.
>
> "In determining whether the contract, the so-called Rule 3.5 and the policy against public ownership was unreasonable, you may also consider defendants' purpose in imposing the rule and the policy.

> "A purpose or intent to harm competition by itself is not sufficient to establish an unreasonable restraint of trade. However, consideration of the purpose of the restraint may help you in determining if it would likely have a harmful effect on competition.
>
> "You may consider, for example, whether defendants imposed the contract to achieve a legitimate business purpose, and if so, *whether the restraint was tailored to achieve that legitimate business purpose or rather was broader than necessary.*" (S.A. 259; emphases added.)

Petitioners never objected to this instruction and never raised an issue concerning any portion of it in their post-trial motions. In their appellate brief, petitioners did not contend that the trial court's instruction about the need for consideration of whether the alleged restraint of trade is narrowly tailored misstated the law; instead, they simply argued that the public ownership ban should be presumed lawful, since it was ancillary to the allegedly legitimate functions of the NFL. "Brief of Defendants-Appellants," pp. 35-40 (March 1, 1994) ("Defs.' Br."). The First Circuit properly rejected this argument, noting that relevant Supreme Court precedent did not make inapplicable a Rule of Reason analysis merely because a given practice among joint venture participants is purportedly ancillary to legitimate activity.[2] 34 F.3d at 1102; Pet. App. 18a. It stated that the reasonableness of the public ownership ban should be considered by the jury and that "one factor" in such consideration should be an assessment of "less restrictive, equally beneficial" alternatives. 34 F.3d at 1103; Pet.App. 19a.

In their petition for rehearing, petitioners disputed the First Circuit's ruling, but again did not assert that it was inappropriate to consider under the Rule of Reason whether an alleged restraint is

---

[2] The First Circuit did not hold that the public ownership ban was an ancillary restraint related to legitimate activities of the NFL. It did, however, assume *arguendo* that the ban could be so characterized and then concluded that the Rule of Reason would be applied by the factfinder to assess its legality. 34 F.3d at 1102; Pet.App. 17a-18a. A factfinder, of course, could determine that the ban is not related to the ability of the league to produce a quality product; the AFL did so, and other major sports leagues do so, without any similar prohibition.

overbroad. Instead, they *conceded* that a less restrictive alternative concept was an appropriate consideration, but contended that the First Circuit misanalyzed the application of the concept to this case.

> "One factor occasionally present in the rule of reason analysis is the less restrictive alternative concept. *E.g., Kentucky Fried Chicken Corp. v. Diversified Packaging Corp.*, 549 F.2d 368, 381 (5th Cir. 1977) (presence of less restrictive alternative 'is a factor to be considered in the reasonableness analysis'). The alternative must meet two tests: (1) It must be less restrictive of competition than the policy under challenge; and (2) it must provide the same benefits as the challenged policy. (Slip op. 22.)[3]
>
> "*It is undisputed that the alternative identified by the Court utterly fails to meet the second test.*" ("Appellants' Petition for Rehearing," p. 9 (Sept. 29, 1994); emphases in original.)

In a footnote, petitioners did contend that it was unnecessary to apply a "less restrictive alternative notion" to "joint venture analysis" because "[t]he analytical principles reflected in that notion are already incorporated in the process of determining whether the challenged practice is not only ancillary to the joint venture's purposes but is reasonably related to those purposes." *Id.* at 10 n.6. They went on to state that "[h]owever, in view of the fact that there can be no finding of a less restrictive alternative on the record in this case, there is no need for the Court to address this point." *Id.* at 11 n.6.

Thus, petitioners *admitted* that the less restrictive alternative concept was part of a Rule of Reason analysis, which is precisely what the First Circuit found. This Court is therefore being asked to address

---

[3] Petitioners' contention in their rehearing brief is factually inaccurate, because the alternative proposal offered by respondent at the October 1987 league meeting did serve the same objectives as the public ownership ban. This conclusion is supported by a 1985 NFL internal legal memorandum discussing less restrictive alternatives (Exh. 7) and by the trial testimony of petitioners' own expert and fact witnesses (J.A. 432-33, 1413; S.A. 211).

an issue that was not only never raised below, but was also conceded by petitioners, who told the First Circuit not to address it.

C. Consideration Below Of The Single Enterprise Issue.

Petitioners also failed to raise the allegedly crucial single enterprise defense (based on *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984)) at the trial level with respect to the NFL, presumably because, as will be explained below, no court has ever accepted this defense in any antitrust action against the league.

Thus, petitioners did *not* present this argument as part of their motion to dismiss filed in June of 1992 or their summary judgment motion filed in June of 1993. *See* S.A. 1-28, 43-73. A *Copperweld* argument was instead advanced only in the separate dismissal and summary judgment motions filed by Pete Rozelle and Paul Tagliabue, who alleged that they could not be found liable for any agreement with their employer. S.A. 33-38, 81-84. Their separate contentions became moot when the trial court later directed a verdict in their favor. Likewise, the *Copperweld* argument was not raised with respect to the NFL and its member clubs in petitioners' motion for judgment as a matter of law during trial, in any post-trial motions, or in their notice of appeal.

Petitioners also proposed no jury instructions based on a *Copperweld* defense. The trial court instructed the jury that the NFL and its defendant member clubs entered into a contract or agreement with respect to the public ownership policy and Article 3.5. S.A. 238, 246. Petitioners' counsel did not object to these instructions; while he did seek to have the jury advised about joint ventures generally, he also said "[w]e propose a specific instruction that does not make it a matter of legal defense. And I know [plaintiff's counsel] will jump up and down if I make that argument." S.A. 273. Likewise, when confronted with a verdict form that advised the jury that the NFL and its member clubs entered into a contract or agreement, petitioners' counsel once again raised no objection and instead conceded that "[w]e understand your ruling as a matter of law. Clearly there was a contract entered into." J.A. 1512. Three days later, the same counsel told the jury with respect to the trial court's finding of a contract or agreement that "[w]e

don't challenge that. Nobody challenges that. It's an agreement, it's a contract . . . to abide by the [NFL] Constitution." S.A. 234.[4]

In sum, petitioners' statements and conduct at trial compel the conclusion that they deemed the single enterprise defense to be an untenable one and therefore consciously decided to raise no objections based on it. This is, of course, in stark contrast to the position that they are taking now.

The first time the petitioners raised the issue of the *Copperweld* defense with respect to the NFL and its member clubs was belatedly in their appellate brief, where they contended that the NFL and its member clubs functioned as a joint venture and could not legally conspire. Defs.' Br., pp. 28-35. The First Circuit elected to address the topic and rejected the NFL's claim, stating that the league and its members do not exhibit the unity of interests found to be a decisive prerequisite in *Copperweld*. 34 F.3d at 1099; Pet.App. 10a-12a. As explained below, this ruling is unassailably correct.

REASONS FOR DENYING THE PETITION

I. LEGAL FRAMEWORK ESTABLISHED BY THIS COURT'S PRECEDENTS.

The decisions of this Court applying the antitrust laws to joint ventures are far from being as confusing and unsettled as petitioners (and some commentators) claim. This Court has typically held that agreements among joint venturers to fix prices or divide markets are unlawful *per se*.[5] The one possible exception to this principle was that noted in *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1 (1979) ("*BMI*"), where the Court held that joint agreement by 20,000 music copyright owners to license commercial use of the

---

[4] These concessions at the trial level undoubtedly influenced the district court's determination that respondent's Section 2 claim was surplusage. They also influenced respondent's decision not to seek an appeal of the directed verdict as to that claim.

[5] *E.g.*, *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332, 342-57 (1982); *United States v. Topco Assocs.*, 405 U.S. 596, 606-12 (1972); *Citizens Pub. Co. v. United States*, 394 U.S. 131, 135-36 (1969); *United States v. Sealy, Inc.*, 388 U.S. 350, 351 (1967); *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 598 (1951).

copyrighted works should be judged under the Rule of Reason. Although the agreement might be literally construed as one fixing prices, the Court noted that a *per se* analysis was inadvisable because "the agreement on price is necessary to market the product at all." *Id.* at 8. The Court found that a reasonableness inquiry was appropriate because it would be virtually impossible for the copyright owners to compete effectively without a joint licensing arrangement. *Id.* at 21-23.

In cases not involving overt price fixing or division of markets, the Court has applied a Rule of Reason, rather than a *per se*, analysis. *See, e.g.*, *Federal Trade Comm'n v. Indiana Fed'n of Dentists*, 476 U.S. 447, 459 (1986) (invalidating association's refusal to supply X-rays to insurers seeking to evaluate claims for benefits); *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 295-98 (1985) (expulsion decision by association should have been tested under the Rule of Reason); *National Collegiate Athletic Ass'n v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 101-02 (1984) ("*NCAA*") (invalidating restrictions on televised appearances by college football teams); *National Soc'y of Professional Engineers v. United States*, 435 U.S. 679, 694-96 (1978) ("*Professional Engineers*") (invalidating limitations on competitive bidding intended to promote the safety and quality of engineering on public projects).

In applying the Rule of Reason in joint venture cases, this Court has typically considered the full range of factors identified by Justice Brandeis in *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918), including the nature, history and purpose of the restraint, the market affected, and the objective sought to be obtained. One of the factors so considered by this Court is whether the objectives underlying the restraint could be achieved through a more narrowly constructed restriction. Thus, in the *NCAA* case, the television plan at issue was held to be "not even arguably tailored" to serve the purported objective of competitive balance; the Court noted that narrower restrictions were "much better tailored to the goal of competitive balance than the television plan . . .." 468 U.S. at 119. Similarly, in *Professional Engineers*, while the Court recognized that quality concerns and ethical concerns about deceptively low bids for engineering services were legitimate, the ban on competitive bidding at issue there was "simply too broad" to be sustainable. 435 U.S. at 696. As Professor Phillip Areeda has concluded after reviewing these and other cases, "[t]he importance

of less restrictive alternatives is clear . . .." VII PHILLIP E. AREEDA, ANTITRUST LAW, ¶1505b at 386 (1986) ("AREEDA").[6]

In *Professional Engineers*, this Court also made it equally clear that "[t]he Rule of Reason . . . has been regarded as a standard for testing the enforceability of covenants in restraint of trade which are ancillary to a legitimate transaction, such as an employment contract or the sale of a going business." 435 U.S. at 689. As noted above, the ban on competitive bidding involved in that case was held not to survive such a reasonableness scrutiny; it was contrasted invidiously with marketing restraints related to the safety of a product that "have no anticompetitive effect and that . . . are reasonably ancillary to the seller's main purpose." *Id.* at 696 n.22. In short, as the First Circuit noted, the ancillary restraint doctrine does not displace the Rule of Reason, but merely calls that rule into play. 34 F.3d at 1102; Pet.App. 18a. *Accord Los Angeles Memorial Coliseum Comm'n v. NFL*, 726 F.2d 1381, 1390 (9th Cir.) ("Contrary to the NFL's apparent belief, the ancillary restraint doctrine is not independent of the rule of reason"), *cert. denied*, 469 U.S. 990 (1984) ("*L.A. Coliseum*"). This reasonableness analysis consists of the assessment this Court has typically undertaken in joint venture cases, including a consideration of less restrictive, but equally beneficial, alternatives. 34 F.3d at 1103; Pet.App. 19a; *L.A. Coliseum*, 726 F.2d at 1396.

Given the foregoing, it is readily apparent that the First Circuit's joint venture analysis is well within the parameters of this Court's precedents.

---

[6] While Chief Justice William Rehnquist has disagreed with the use of a "*least* restrictive alternative" analysis, he, too, has expressed support for the view that any restraint must be "reasonably necessary" to serve a joint venture's purported objectives for imposing it. *NFL v. North American Soccer League*, 459 U.S. 1074, 1080 (1982) (Rehnquist, J., dissenting).

II. THE FIRST CIRCUIT DID NOT UTILIZE A "LEAST RESTRICTIVE ALTERNATIVE" ANALYSIS AND THE ANALYSIS IT DID USE IS CONSISTENT WITH THE LAW OF THIS COURT AND OTHER CIRCUITS.

Petitioners' first point--that the First Circuit erred in utilizing a "least restrictive alternative" analysis--provides no basis for granting their petition, for several reasons.

First, as noted above in Section II.B of the Statement of the Case, this issue was neither raised to nor considered by the courts below. As a consequence, it should not be advanced here as a basis for certiorari. *Sisson v. Ruby*, 497 U.S. 358, 359 n.1 (1990); *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

Second, the petitioners have grossly mischaracterized the holding of the First Circuit by calling it a "*least* restrictive alternative" analysis. Pet. at 10. As noted in Section II.B of the Statement of the Case, the First Circuit simply said that "one factor" among many in the jury's reasonableness analysis should be whether "a reasonable, less restrictive alternative to the [public ownership] policy exists that would provide the same benefits as the current restraint." 34 F.3d at 1103; Pet.App. 19a. The trial court's instruction to the jury, quoted above, was phrased similarly. Petitioners attempt to argue that this consideration of "less restrictive alternatives" is really a consideration of "least restrictive alternatives," since no matter what lesser restraint is identified, an even less onerous one could be hypothesized. Pet. at 10 n.8. This contention ignores the rulings below. The least restrictive alternative in this case would be having no constraint whatsoever on public ownership. Yet the First Circuit (and the trial court) would not regard that as a viable alternative, because it could not provide the same alleged benefits (assuming *arguendo* that there are some) of the NFL's current policy. Both the appellate and trial court took pains to focus on lesser

alternatives that could be deemed *equally* beneficial, something petitioners ignore.[7]

Finally, the petitioners have been unable to identify any true split among the circuits justifying certiorari. The decisions from other circuits involving sports leagues or associations all utilize the same Rule of Reason analysis,[8] which was also utilized by this Court in *NCAA*. Petitioners try to contrive a conflict by focussing on the decisions of the Tenth Circuit in *SCFC ILC, Inc. v. VISA USA, Inc.*, 36 F.3d 958 (10th Cir. 1994) and the District of Columbia Circuit in *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1033 (1987). Neither case, however, presents a conflict.

In *SCFC*, the Tenth Circuit stated that:

> "We do not read the [Supreme] Court's precedent involving joint ventures to imply any special treatment or differing antitrust analysis. Indeed, aside from clarifying the inappropriateness of automatically invoking per se scrutiny of a joint venture's alleged antitrust violation, the Court has not articulated a different rule of reason approach. Thus, under the Court's precedent, cooperative business activity in one setting may permit its participants to achieve market

---

[7] Likewise, other cases cited by petitioners that purportedly apply a "least" restrictive alternatives analysis did nothing of the kind. *See Image Technical Servs., Inc. v. Eastman Kodak Co.*, 903 F.2d 612, 618 (9th Cir. 1990) (consideration of a "less restrictive" alternative), *aff'd on other grounds*, 504 U.S. ___, 112 S.Ct. 2072 (1992); *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1354 (5th Cir. 1980) (consideration of whether realtors' association's membership rules were "narrowly tailored to accomplish their legitimate goals").

[8] In addition to the First Circuit's opinion, *see Chicago Professional Sports Ltd. Partnership v. National Basketball Ass'n*, 961 F.2d 667, 675-76 (7th Cir.), *cert. denied*, 113 S.Ct. 409 (1992); *L.A. Coliseum*, 726 F.2d at 1396; *North American Soccer League v. NFL*, 670 F.2d 1249, 1261 (2d Cir.), *cert. denied*, 459 U.S. 1074 (1982). *See also United States Trotting Ass'n v. Chicago Downs Ass'n, Inc.*, 665 F.2d 781, 790 (7th Cir. 1981); *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1183 (D.C. Cir. 1978) (both considering whether challenged restraint went beyond the level reasonably necessary to accomplish the legitimate business purpose sought to be effectuated).

> efficiencies or economies of scale, while in another, a similar activity might run afoul under rule of reason review." (36 F.3d at 964-65; footnote omitted.)

As the Tenth Circuit went on to note, "[w]hat we ask under Section 1 is whether the alleged restraint is reasonably related to [defendant's] operation and *no broader than necessary to effectuate the association's business*." *Id.* at 970; emphases added. This language clearly permits consideration of less restrictive but equally beneficial alternatives.[9] The First Circuit therefore understandably *relied* on *SCFC* to support its analysis of the application of the antitrust laws to joint ventures. 34 F.3d at 1102; Pet.App. 19a.

Judge Robert Bork's opinion in *Rothery* is also consistent with the First Circuit's ruling. He said:

> "To be ancillary, and hence exempt from the per se rule, an agreement eliminating competition must be subordinate and collateral to a separate, legitimate transaction. The ancillary restraint is subordinate and collateral in the sense that it serves to make the main transaction more effective in accomplishing its purpose. Of course, the restraint imposed must be related to the deficiency sought to be achieved. *If it is so broad that part of the restraint suppresses competition without creating efficiency, the restraint is, to that extent, not ancillary*. [Judge (later Chief Justice)] Taft added the further obvious qualification that even restraints ancillary in form are illegal if they are part of a general plan to

---

[9] The Tenth Circuit upheld the rules limiting membership in a credit card issuers' association primarily because VISA U.S.A. lacked market power that could affect output or prices. 36 F.3d at 966-68, 972. Here, of course, the NFL is an adjudged monopolist in the market for major league professional football in the United States. *United States Football League v. NFL*, 644 F.Supp. 1040, 1042 (S.D.N.Y. 1986), *aff'd*, 842 F.2d 1335 (2d Cir. 1988). Furthermore, it controls, through its public ownership policy, 100 percent of the ownership interests included in the relevant market found by the jury, which was not contested on appeal.

gain monopoly control of a market." (792 F.2d at 224; footnote omitted; emphasis added.)[10]

Again, *Rothery* makes it clear that the breadth of the challenged restraint is a proper consideration; it is simply factored into the analysis of ancillarity. *See id.* at 231 n.4 (Wald, J., concurring). This view confirms Judge Bork's previously stated position that ancillary restraints imposed by a joint venture should be found lawful only if "the parties are cooperating in an economic activity other than the elimination of rivalry and the agreement [incorporating such restraints] must be capable of increasing the effectiveness of that cooperation *and no broader than necessary for that purpose.*" ROBERT BORK, THE ANTITRUST PARADOX 279 (1978); emphases added.[11] *Cf.* AREEDA ¶1505b at 388 (when courts say a restraint must be "reasonably necessary" to achieve a legitimate objective, "[i]t would not be if equal benefits could be obtained through substantially less restrictive routes").

What petitioners are really asking this Court to do is to undertake a step no previous Supreme Court or circuit court ruling has undertaken: to remove the consideration of less restrictive but equally beneficial alternatives from any inquiry into the practices of joint ventures, either at the phase of deciding whether the practice is ancillary or at the phase of balancing under the Rule of Reason. To do so would require this Court to overrule its own decisions in *Professional Engineers* and *NCAA* and the uniform precedent from the circuit courts.

---

[10] Again, the dispositive point in *Rothery* was that Atlas Van Lines' adoption of a new policy terminating agents which did not transfer independent operations to separate and distinct companies was not illegal in light of "Atlas' small market share." *Id.*

[11] Judge Bork in this treatise further noted that a joint venture and its ancillary restraints must also not involve a collective market share that presents a realistic danger of output restriction and reflects no primary intent or purpose to restrict output. *Id.* The public ownership ban fails to satisfy either of these criteria, since the NFL has a 100% collective market share and there was abundant record evidence of an intent to eliminate competition in the relevant market. 34 F.3d at 1100; Pet.App. 13a-14a. *See* Drew Krause, *The National Football League's Ban on Corporate Ownership: Violating Antitrust To Preserve Traditional Ownership--Implications Arising From William H. Sullivan's Antitrust Suit*, 2 Seton Hall J. of Sports Law 175, 198-200 (1992) (noting that public ownership ban is not a valid ancillary restraint).

Indeed, the NFL goes even one step further in asking that the public ownership ban be deemed legal without any inquiry into the anticompetitive nature of that prohibition or the existence of any procompetitive reasons for it. At the trial below, respondent offered extensive evidence that the asserted reasons for the ban either lacked substance or were based on a fear of competition that, in the words of this Court in *Professional Engineers* was "nothing less than a frontal assault on the basic policy of the Sherman Act." 435 U.S. at 695. The jury could thus have reasonably concluded that no rule restricting the form of ownership of NFL member clubs would have been reasonable, even if equally beneficial but less restrictive alternatives were available. Such a conclusion would clearly be warranted where the claimed rationales in favor of the public ownership ban were insubstantial in comparison to its anticompetitive effects. Petitioners contend that they were entitled to judgment as a matter of law on the legality of the ban, but have not identified a single procompetitive or efficiency-enhancing aspect of it.[12]

III. THE FIRST CIRCUIT'S RULING ON THE SINGLE ENTERPRISE DEFENSE IS CONSISTENT WITH PRECEDENT.

The First Circuit's ruling that the NFL is an entity capable of conspiring with its members also furnishes no basis for a writ of certiorari.

First, while the issue was raised to and decided by the First Circuit, this Court should consider whether petitioners are estopped to rely on this issue for present purposes, given their repeated concessions at the trial, discussed in Section II.C of the Statement of the Case. *See United States v. McCaskey*, 9 F.3d 368, 378 (5th Cir. 1993) (discussing doctrine of judicial estoppel), *cert. denied*, 114 S.Ct. 1565 (1994). Such estoppel is particularly appropriate here because, had petitioners pressed the issue at the trial level, respondent would have presented evidence relating to exceptions to the single enterprise concept that were

---

[12] This is not a case like *BMI* where the restraint (a blanket license) was necessary to create the market alleged to be anticompetitive. Here, as in *NCAA*, the product at issue was "still sold on an individual basis, only in a non-competitive market." 468 U.S. at 114.

recognized by this Court in *Copperweld*, such as the "personal stake" exception where corporate officers acting on their own behalf can conspire with their employer. 467 U.S. at 769 n.15. In addition, the trial court might not have directed a verdict on respondent's monopolization claim, which it believed constituted surplusage, given the claim under Section 1 of the Sherman Act.

Second, even if the Court does deem the issue to be properly preserved, there is no split of authority among the circuits on this matter.

While this Court has never had occasion to consider the status of the NFL in connection with the single enterprise theory and while commentators have disagreed about the topic, circuit court precedent in antitrust cases brought against the league has uniformly decided the question adversely to the NFL. Since 1982, courts in five different circuits have ruled explicitly or by implication that the league and its 28 member clubs are sufficiently separate economic actors to be subject to 15 U.S.C. §1. *L.A. Coliseum*, 726 F.2d at 1389-90; *North American Soccer League v. NFL*, 670 F.2d 1249, 1256-58 (2d Cir.), *cert. denied*, 459 U.S. 1074 (1982) ("*NASL*"); *McNeil v. NFL*, 790 F.Supp. 871, 879-80 (D.Minn. 1992); *Mid-South Grizzlies v. NFL*, 550 F.Supp. 558, 566-67 (E.D.Pa. 1982), *aff'd*, 720 F.2d 772 (3d Cir. 1983), *cert. denied*, 467 U.S. 1215 (1984); *Brown v. Pro-Football, Inc.*, 1992-1 Trade Cas. (CCH) ¶69,747 at 67,403-04 (D.D.C. 1992) (appeal pending). Similar implicit determinations exist in other older cases.[13]

---

[13] *See Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1177 & n.11 (D.C. Cir. 1978); *Mackey v. NFL*, 543 F.2d 606, 616 & n.19 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977); *Kapp v. NFL*, 390 F.Supp. 73, 80-82 (N.D.Cal. 1974), *aff'd in part and rev'd in part*, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907 (1979); *United States v. NFL*, 116 F.Supp. 319, 321 (E.D.Pa. 1953).

Petitioners cite the dissent of Judge Spencer Williams in *L.A. Coliseum* in support of their view. Pet. at 22 n.24. However, he stated that NFL clubs do have "independent and economically significant identities" when dealing with "upstream suppliers," which he defined to include "potential investors." 726 F.2d at 1406 (Williams, J., dissenting). Thus, the present case, involving a ban on certain potential investors in NFL clubs, would not necessarily bring the single enterprise doctrine into play, in Judge Williams' view.

(continued...)

The cases decided since 1982 arose in a variety of contexts. The jury in the *L.A. Coliseum* case invalidated the NFL's franchise relocation rule. The *Mid-South Grizzlies* case involved exclusion of a proposed expansion franchise, while *Brown* involved the fixing of wages for development team players in the 1989 season. The jury in the *McNeil* case invalidated the league's rules regarding rights of first refusal and compensation for football players whose contracts expire. *See McNeil v. NFL*, 1992-2 Trade Cas. (CCH) ¶69,982 (D.Minn. 1992). And the *NASL* case involved the invalidation of a rule preventing owners or those in control of an NFL member club from owning a team in any other major sports league. In these cases, the courts looked to the facts that NFL clubs: are owned by distinct corporations or partnerships; do not share expenses, capital expenditures, profits or losses; are managed independently and make their own decisions as to the hiring and compensation of players and coaches, ticket prices, and the terms of stadium leases; derive separate revenues from sources such as local television and radio, parking, concessions and luxury box seats; have widely varying profits; compete in the acquisition of players, coaches and management personnel; and compete directly or potentially for fan support, media space, and local television and radio revenues. *McNeil v. NFL*, 790 F.Supp. at 879 n.10. The district court in *McNeil* noted that the various circuits had focussed on the fact that, despite partial revenue sharing, the financial performance of each NFL team does not necessarily rise or fall with that of the others. *Id.* at 880 n.11. It also noted that not all NFL club owners viewed the teams as a single economic unit, and that at least one has characterized them as "vicious competitors." *Id.* at 879 n.9. Similar evidence of such competition was presented here.

Petitioners' response to such precedent is that most of these cases antedate this Court's decision in *Copperweld*. They point to the fact that the Eighth Circuit in *City of Mt. Pleasant v. Associated Elec. Coop.*, 838 F.2d 268 (8th Cir. 1988), relying on *Copperweld*, ruled that

---

[13] (...continued)

Petitioners also cite Professor Areeda in support of their view (Pet. at 22 n.25), but fail to note that he believed the *NASL* case, which dealt with a rule prohibiting owners of NFL clubs investing in other professional sports, was properly decided. He asserted that Section 1 of the Sherman Act "should govern the league rule because it controls the behavior of team owners as independent actors in the investment market." AREEDA ¶1478d at 358. The same is true of the public ownership ban here.

a joint venture consisting of rural electrical cooperatives constituted a single enterprise incapable of conspiring within the meaning of Section 1 of the Sherman Act, and speculate that "[t]he case at bar would have been decided differently in the Eighth Circuit." Pet. at 19.[14] However, the single enterprise status of the NFL *was* decided by a district court in the Eighth Circuit (in the *McNeil* case) four years after *Mt. Pleasant* and eight years after *Copperweld*. That district court--the Honorable David S. Doty in the District of Minnesota--ruled that an argument identical to the one presented here was barred by this Court's ruling in *NCAA*:

> "The court believes that [the NFL's] interpretation of *Copperweld* is irreconcilable with the Supreme Court's decision in [*NCAA*,] in which the Court applied §1 to restraints that the NCAA claimed were necessary to facilitate the joint venture of a college football league. Although acknowledging that college football was 'an industry in which horizontal restraints on competition are essential if the product is to be available at all,' [468 U.S.] at 101 . . . the Court nevertheless determined that the challenged restraints were subject to an abbreviated rule of reason analysis, expressly relying on precedent that held that 'joint ventures have no immunity from antitrust laws.' *Id.* at 113 . . .. Based on the foregoing, the court rejects defendants' contention that *Copperweld* immunizes them from antitrust liability, concludes that the NFL defendants are not a single economic entity for purposes of liability under §1 of the Sherman Act and

---

[14] Petitioners also cite some *dicta* in *Chicago Professional Sports Ltd. Partnership v. National Basketball Ass'n*, 961 F.2d 667, 676 (7th Cir.), *cert. denied*, 113 S.Ct. 409 (1992), for the proposition that the Seventh Circuit might agree that sports associations should be viewed as single enterprises. Pet. at 20. Of course, the holding in that case was that the National Basketball Association's telecasting rules at issue there violated Section 1 of the Sherman Act. 961 F.2d at 676-77. *See also United States Trotting Ass'n v. Chicago Downs Ass'n, Inc.*, 665 F.2d at 787-90 (applying Rule of Reason to antitrust counterclaim against sports association).

> denies their motion for summary judgment on that basis.'" (790 F.Supp. at 880.)[15]

This decision comports completely with the First Circuit's ruling, which cited the district court opinion in *McNeil*. 34 F.3d at 1099; Pet.App. 11a. *Cf. Volvo North America Corp. v. Men's Int'l Professional Tennis Council*, 857 F.2d 55, 71 (2d Cir. 1988) (holding sports league and its members were separate entities for antitrust purposes, citing *NCAA* and *NASL* cases). The First Circuit additionally *relied* on *Mt. Pleasant*, noting that the critical inquiry in that case was whether the electrical cooperative's members pursued interests diverse from that of the cooperative. 34 F.3d at 1099; Pet.App. 11a. *See* 838 F.2d at 274-77. It went on to point out that such diverse interests unequivocally exist here.

Even assuming *arguendo* that the NFL and its member clubs should be treated as a single entity for some purposes, there is no basis to conclude that they should be treated as such an entity for the purposes of adjudging the legality of the public ownership ban. Team owners do compete for investment capital and the effect of the ban forecloses a major source of such capital from them. Clearly, many team owners wanted that ban to remain in place because they feared that public ownership of any type would inhibit their respective abilities to compete in the investment market. 34 F.3d at 1100; Pet.App. 12a-13a. These are precisely the types of diverse interests that the court in *Mt. Pleasant* considered crucial in determining whether members of an association can conspire.

---

[15] It should be noted that this Court in *NCAA* cited a law review article (468 U.S. at 99 n.18), which specifically advocated that the NFL not be treated as a single entity for antitrust purposes. *See* Maxwell Blecher and Howard Daniels, *Professional Sports And The "Single Entity" Defense Under Section One Of The Sherman Act*, 4 Whittier L.Rev. 217, 232-33, 235-38 (1982).

While there are differences between the NCAA and the NFL (such as the number of member teams), it has been noted that college football games are scheduled years in advance, so each NCAA member's ability selectively to choose worthy opponents is limited. Lee Goldman, *Sports, Antitrust, and The Single Entity Theory*, 63 Tulane L.Rev. 751, 786 (1989) ("Goldman"). And, as noted by Judge Doty, each co-venturer in the NCAA has an interest in the success of other co-venturers, just as in professional sports leagues. *See id.*

Petitioners argue that the NFL club owners could have constituted the league as a corporation with unincorporated divisions, in which case the single entity defense would be applicable, and contend that antitrust liability ought not to be premised on the form of organization which they chose. Pet. at 22. However, the Court in *Copperweld* limited its holding to concerted action between a corporation and its wholly owned subsidiary, due to the fact that they exhibit a "complete unity of interest" and that their acts are guided by one "corporate consciousness." 467 U.S. at 770. That is manifestly not true of the NFL.[16] That the league could have structured its operations in a more unified fashion is legally irrelevant; "the analysis of whether there is an agreement for antitrust purposes must take the market as it currently exists, not as it hypothetically might have been." Goldman at 765; footnote omitted.

Moreover, adoption of the legal principle advanced by petitioners would, in the words of one commentator, "pose[ ] a dangerous precedent for a diverse range of substantive areas," such as the antitrust treatment of typical manufacturer/distributor relations. *Id.* at 792-93. It is respectfully submitted that the Court should not make such a precedent in a case like this one, where it is clearly unwarranted.

---

[16] To the extent petitioners are comparing the NFL to a law firm (Pet. at 21 & n.23), the analogy is inapposite. *See* Goldman at 780-82. Members of a law firm typically share revenues from a common "pot," whereas the NFL teams have separate revenue sources (such as from sales of luxury box seats or from local television contracts). Moreover, law partners are subject to the day-to-day control of their firm and usually cannot make large capital expenditures without prior firm approval. This is not true of NFL clubs. Finally, no single law firm exhibits the market power of the NFL.

Likewise, petitioners' analogy of General Motors imposing restrictions on the sale of its stock by shareholders is inapposite. Pet. at 21. The better analogy would be to an agreement among General Motors and its shareholders to limit the investment decisions of the latter. Professor Areeda has clearly indicated that such an agreement would violate Section 1 of the Sherman Act. AREEDA ¶1476a at 338, ¶1478d at 358.

CONCLUSION

For the reasons stated above, the Court should deny the petition for a writ of certiorari to the Court of Appeals for the First Circuit.

Respectfully submitted,

FREDERICK P. FURTH*
DANIEL S. MASON
BRUCE J. WECKER
MICHAEL P. LEHMANN
FURTH, FAHRNER & MASON
201 Sansome St., Ste. 1000
San Francisco, CA 94104
(415) 433-2070

JOSEPH L. ALIOTO
ANGELA M. ALIOTO
LAW OFFICES OF JOSEPH L. ALIOTO
650 California St., 25th Floor
San Francisco, CA 94108
(415) 434-2100

ALAN R. HOFFMAN
LYNCH, BREWER, HOFFMAN & SANDS
101 Federal St., 22nd Floor
Boston, MA 02110
(617) 951-0800

Counsel for Respondent

*Counsel of Record

January 9, 1995

(3)

No. 94-1048

FILED
FEB 8 1995
IN THE OFFICE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

NATIONAL FOOTBALL LEAGUE, *et al.*,
Petitioners,

v.

WILLIAM H. SULLIVAN, JR.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

---

REPLY BRIEF

JOHN VANDERSTAR *
SONYA D. WINNER
THOMAS O. BARNETT
ETHAN M. POSNER

COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-5540
Attorneys for Petitioners

* Counsel of Record

FEBRUARY 1995

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

14pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
I. THE ANCILLARY RESTRAINTS DOCTRINE	2
A. Least Restrictive v. Less Restrictive	2
B. "No Broader Than Necessary"	4
II. THE SINGLE ENTERPRISE ISSUE	6
III. WAIVER AND ESTOPPEL	8
CONCLUSION	10

TABLE OF AUTHORITIES

Cases Page

American Motor Inns, Inc. v. *Holiday Inns, Inc.*, 521 F.2d 1230 (3d Cir. 1975) 2, 4
Aspen Title & Escrow, Inc. v. *Jeld-Wen, Inc.*, 677 *F. Supp.* 1477 (D. Or. 1987) 6
Brown v. *Pro Football, Inc.*, 1992-1 Trade Cas. (CCH) ¶ 69,747 (D.D.C. 1992), *appeal pending*, Nos. 93-7102, 93-7165 (D.C. Cir.) 7
Calderon v. *Witvoet*, 999 F.2d 1101 (7th Cir. 1993) 9
City of Mount Pleasant v. *Associated Electric Cooperative, Inc.*, 838 F.2d 268 (8th Cir. 1988) 6, 7, 8
Copperweld Corp. v. *Independence Tube Corp.*, 467 U.S. 752 (1984) 6, 7, 8
International Travel Arrangers v. *NWA, Inc.*, 991 F.2d 1389 (8th Cir.), *cert. denied*, 114 S. Ct. 345 (1993) 7, 8
Los Angeles Memorial Coliseum Comm'n v. *National Football League*, 726 F.2d 1381 (9th Cir.), *cert. denied*, 469 U.S. 990 (1984) 7
McNeil v. *National Football League*, 790 F. Supp. 871 (D. Minn. 1992) 7
Mid-South Grizzlies v. *National Football League*, 550 F. Supp. 558 (E.D. Pa. 1982), *aff'd*, 720 F.2d 772 (3d Cir. 1983), *cert. denied*, 467 U.S. 1215 (1984) 7
NCAA v. *Board of Regents*, 468 U.S. 85 (1984) 7
North American Soccer League v. *National Football League*, 670 F.2d 1249 (2d Cir.), *cert. denied*, 459 U.S. 1074 (1982) 7, 9
Novatel Communications, Inc. v. *Cellular Telephone Supply, Inc.*, 1986-2 Trade Cas. (CCH) ¶ 67,412 (N.D. Ga. 1986) 6
Rothery Storage & Van Co. v. *Atlas Van Lines, Inc.*, 792 F.2d 210 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1033 (1987) 4, 5, 6
SCFC ILC, Inc. v. *Visa USA, Inc.*, 36 F.3d 958 (10th Cir. 1994) 4, 5, 6
Sullivan v. *Tagliabue*, 795 F. Supp. 56 (D. Mass. 1992) 9

TABLE OF AUTHORITIES—Continued

Page

United States v. *Mejia-Alarcon*, 995 F.2d 982 (10th Cir.), *cert. denied*, 114 S. Ct. 334 (1993) .. 9

Volvo North America Corp. v. *Men's International Professional Tennis Council*, 857 F.2d 55 (2d Cir. 1988) 7

Miscellaneous

VII PHILIP E. AREEDA, ANTITRUST LAW (1986) 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1048

NATIONAL FOOTBALL LEAGUE, *et al.*,
Petitioners,

v.

WILLIAM H. SULLIVAN, JR.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

---

REPLY BRIEF

Petitioners ask this Court to clear up conflicts in the Circuits and general confusion in the lower courts and to establish clear rules regarding lawful, useful joint ventures for the guidance of entrepreneurs and lower courts.

First, when a lawful joint venture adopts a rule or policy that helps the venture to produce a better product or service, even though the policy may limit "competition" between the joint venturers which would not otherwise have existed, that rule or policy does not violate the antitrust laws merely because the venture participants might have found a less restrictive way to accomplish their purpose.

Second, when a joint venture produces a product that none of its members could produce alone, and the members are economically dependent on their membership in

the joint venture rather than on their individual existence, the joint venture should be treated as a single enterprise and therefore not subject to the "contract, combination or conspiracy" provisions of the antitrust laws.

Respondent has not provided any reason why the Court should not grant the petition and decide these two important issues.[1]

I. THE ANCILLARY RESTRAINTS DOCTRINE

Petitioners showed that the circuits are divided over the proper application of the ancillary restraints doctrine and that the "least restrictive alternative" approach followed by some circuits should be rejected.

A. Least Restrictive v. Less Restrictive

Respondent challenges petitioner's claim that the court below applied a "least" rather than merely a "less" restrictive alternative approach. However, this distinction, even if accurate, misses the point.[2] Regardless of the label applied to the analysis, the approach espoused by respondent, and the court of appeals in this case, reflects an unacceptable intrusion into the reasonable business judgments of joint venture participants. A plaintiff should not be able to defeat summary judgment when challeng-

---

[1] Notably, respondent does not challenge our showing (Pet. at 7 n.5) that intervention by the Court at this stage of the litigation would be appropriate and useful.

We address respondent's waiver and estoppel arguments *infra*, at pp. 8-10.

[2] As explained in the petition, the "less restrictive" alternative approach ultimately devolves into a "least restrictive" analysis. (Pet. at 10 n.8.) The Third Circuit agrees. *See American Motor Inns, Inc.* v. *Holiday Inns, Inc.*, 521 F.2d 1230, 1249 (3d Cir. 1975) (equating the Ninth Circuit's "less restrictive alternative" test with the Fifth Circuit's "least restrictive alternative" test). (Petitioners note that they incorrectly indicated that *certiorari* had been denied in *American Motor Inns*. Pet. at 14 n.12. This was an error.)

ing an ancillary restraint simply by positing a less restrictive alternative that may, in the opinion of some, achieve similar benefits. If he can, joint venture participants are deprived of any means to protect themselves from the burden, risk, and expense of a jury trial under the antitrust laws, except to choose not to form the venture in the first instance.

The decision in this case illustrates the problem with the "least restrictive alternative" approach. The NFL's public ownership policy opposes all public ownership. The reason is, as the court below found, to promote more efficient governance of the NFL and thus a better product. The question was then whether allowing public ownership of non-voting, minority interests—respondent's "less restrictive alternative"—provided the same benefits. Petitioners demonstrated that it did not: The officers and majority shareholders of a corporation owe a fiduciary obligation to all shareholders, regardless of whether the shareholders are entitled to vote or are in the minority.[3] Yet the First Circuit cited this alternative as providing the same benefits as the NFL's policy. Such confusion is inevitable under a test that asks courts and juries to evaluate "less restrictive alternatives" that were never before claimed to provide the same benefits as the restraint being challenged.

Other courts have recognized the need to afford joint venture participants a range of discretion in structuring an enterprise and, accordingly, have upheld as a matter of law restraints that are "reasonably related" to lawful

---

[3] Sullivan himself testified to facing the same "detrimental conflict" cited by the First Circuit when the Patriots elected to buy out their previous publicly held shares—which were non-voting and a minority—in the mid-1970s. Sullivan testified that "what was in the best interests of the league was a more important factor than what was in the best interests of the stockholders, and that had put me in a constant conflict in my own mind." (Ex. 1253 at 5-128).

joint ventures.[4] Indeed, the choice between the NFL's policy and the alternative proffered by respondent is precisely the kind of "calibration" that Judge Bork denounced in *Rothery* and the Eighth Circuit refused to allow in *SCFC*. Similarly, the Third Circuit in *American Motor Inns*, 521 F.2d at 1248-49,—a case respondent fails to address—took pains to distinguish its more deferential approach from the "least restrictive" alternative available approach taken by other circuits. Professor Areeda also rejects such efforts:

> [R]efined comparisons among alternatives are usually impossible. We must be content to compare crudely the actual restraint with other possibilities. Some courts wisely ask only that the challenged restraint be "reasonably necessary" to achieve a legitimate objective. It would not be if equal benefits could be obtained through *substantially* less restrictive routes. Yet, a restraint can be "reasonably necessary" even though some less restrictive alternative exists.

VII PHILIP E. AREEDA, ANTITRUST LAW ¶ 1505b at 388 (1986) (emphasis added) (cited by respondent at page 15).

B. "No Broader Than Necessary"

Respondent asserts that *some* of the authorities that petitioners cite as rejecting the "least restrictive alternative" analysis in fact follow this approach but characterize it as a "no broader than necessary" test. (Opp. at 13-14.) However, this language refers to the *scope* of the restriction as opposed to the *degree*. In *Rothery*, Judge Bork explained that a restraint is broader than necessary if "part of the restraint suppresses competition without

---

[4] *See, e.g., SCFC ILC, Inc.* v. *Visa USA, Inc.*, 36 F.3d 958 (10th Cir. 1994); *Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc.*, 792 F.2d 210 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1033 (1987); *American Motor Inns, Inc.* v. *Holiday Inns, Inc.*, 521 F.2d 1230 (3rd Cir. 1975).

creating efficiency." 792 F.2d at 224. Judge Bork made clear, however, that as long as the entire restraint provides a benefit to the venture, juries should not be asked to "calibrate degrees of reasonable necessity" or to make "judgments of degrees of efficiency." 792 F.2d at 227. Likewise, in *SCFC*, the Tenth Circuit properly required that the challenged restraint not extend beyond the scope of its proffered justification, but it expressly eschewed any evaluation of the proper degree of any restraint that was reasonably related to that purpose. 36 F.3d at 972.

To illustrate the point, two companies that compete in the manufacture and sale of Product A could form a joint venture to produce an entirely different product, Product B. A provision that restricted the ability of the two companies to compete in the sale of Product A would almost certainly be "broader than necessary" to achieve the legitimate goals of producing Product B. Similarly, in *Rothery*, a decision by Atlas to prohibit *intra*-state competition among its *inter*-state carrier agents might well have been broader than necessary to address Atlas' free-rider concerns in the context of the *inter*-state service at issue in that case.

In this case, the public ownership prohibition is not *broader* than necessary in that, as the First Circuit acknowledged, it is reasonably related to the legitimate goal of creating more efficient league governance.[5] Respondent's use of language in *Rothery* and *SCFC* illustrates the actual and potential confusion in this area and under-

---

[5] It is irrelevant whether the appeals court found this connection as a matter of undisputed fact or assumed the connection *arguendo*, as respondent argues (Opp. at 6 n.2). In either event, the appellate court decision rests upon this connection and must be judged on that basis. Furthermore, respondent effectively conceded this point when he decided to argue for an alternative that would include some restrictions on public ownership. (Opp. at 12.) If there were no such benefits, then there would be no justification for *any* constraint whatsoever on public ownership.

scores the need for guidance from the Court. The Court should clearly establish that ancillary restraints that are reasonably related to the lawful purposes of a joint venture enhance consumer welfare by creating efficiency and thus do not violate Section 1 of the Sherman Act.

II. THE SINGLE ENTERPRISE ISSUE

Respondent argues that no precedent compels the single-enterprise ruling sought by petitioners because the Court in *Copperweld* noted the "complete unity of interest" between a corporation and its wholly-owned subsidiary. (Opp. at 21) (*quoting Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 771 (1984)). While the Court in *Copperweld* necessarily addressed the specific facts of the case then before it, respondent misses our point. The issue is whether petitioners are correct that the *principles* behind the Court's decision in *Copperweld*, as applied in such cases as *City of Mount Pleasant* v. *Associated Elec. Coop., Inc.*, 838 F.2d 268 (8th Cir. 1988), should lead the Court to find a single enterprise, even where there is not a complete unity of interests, when the members of the joint venture are economically dependent on the venture rather than themselves separately.[6] Petitioner respectfully submits that the Court should extend *Copperweld* to this case.

The cases cited by respondent do not compel a contrary result. Most of these cases were decided prior to the Court's 1984 *Copperweld* decision and are therefore

---

[6] This issue has arisen in contexts outside of sports leagues. Thus, for example, some courts have held that a corporation and its majority-owned subsidiary cannot conspire within the meaning of Section 1, while other courts have refused to reach the same result. *Compare Novatel Communications, Inc.* v. *Cellular Telephone Supply, Inc.*, 1986-2 Trade Cas. (CCH) ¶ 67,412 at 62,172-73 (N.D. Ga. 1986) (parent cannot conspire with 51-percent-owned subsidiary) *with Aspen Title & Escrow, Inc.* v. *Jeld-Wen, Inc.*, 677 F. Supp. 1477 (D. Or. 1987) (parent can conspire with subsidiaries in which it owns 60 percent or 75 percent of stock).

immaterial to the analysis.[7] Some cases address different factual circumstances.[8] Other cases did not address the single enterprise issue.[9]

But the most serious failing in the opposition brief is respondent's attempt to explain the decision in *City of Mount Pleasant*. The petition established that this important decision is (a) a logical application of the principles in *Copperweld* and (b) inconsistent with the decision of the First Circuit in the present case. Respondent never addresses this argument. Instead, he rests on a citation of *McNeil* v. *National Football League*, 790 F. Supp. 871 (D. Minn. 1992), a subsequent *district court* decision in the same circuit which does not even cite *City of Mount Pleasant*. Because *McNeil* was settled, the Eighth Circuit never addressed this district court opinion. In any event, the law of the Eighth Circuit remains unchanged by the *McNeil* decision, as shown by *International Travel Ar-*

---

[7] *See, e.g., Los Angeles Memorial Coliseum Comm'n* v. *National Football League*, 726 F.2d 1381 (9th Cir.), *cert. denied*, 469 U.S. 990 (1984); *North American Soccer League* v. *National Football League*, 670 F.2d 1249 (2d Cir.), *cert. denied*, 459 U.S. 1074 (1982); *Mid-South Grizzlies* v. *National Football League*, 550 F. Supp. 558 (E.D. Pa. 1982), *aff'd*, 720 F.2d 772 (3d Cir. 1983), *cert. denied*, 467 U.S. 1215 (1984).

[8] *See, e.g., NCAA* v. *Board of Regents*, 468 U.S. 85 (1984); *Volvo North America Corp.* v. *Men's Int'l Professional Tennis Council*, 857 F.2d 55 (2d Cir. 1988). *NCAA* involved an association that consists of numerous individual colleges and leagues that are far less integrated than the NFL and that were not acting as a single entity with respect to the challenged television limitations. 468 U.S. at 113-14. Similarly, the *Volvo* case involved individual tennis players and independent, competing tennis tournament owners and directors who made arrangements to produce separate tennis events that were not part of a league. *See* 857 F.2d at 58-59.

[9] *Brown* v. *Pro Football, Inc.*, 1992-1 Trade Cas. (CCH) ¶ 69,747 (D.D.C. 1992), *appeal pending*, Nos. 93-7102, 93-7165 (D.C. Cir.).

rangers v. *NWA, Inc.*, 991 F.2d 1389, 1398 (8th Cir.), *cert. denied*, 114 S. Ct. 345 (1993).

In this case, respondent ignores the economic reality that the NFL consists of interdependent teams that must act in a collective manner to provide the league's entertainment product to the public. As Chief Judge Arnold explained in *City of Mount Pleasant*, economic reality within a cooperative venture "will always" include "varying interests" and coalitions that "come and go according to changing conditions and the interests of the various factions." 838 F.2d at 277. However, this fact is immaterial if the economic success of the venture's members "depends, and has always depended, on the cooperation among themselves." *Id.* The members of the NFL do not compete with the NFL itself, and they do not compete with one another *except* as they have chosen to do so within the NFL structure. That is the dispositive point.

The Court should grant the petition to hold that, under the principles set forth in *Copperweld* and *City of Mount Pleasant*, where a joint venture such as the NFL produces a product that none of the venture participants could produce on its own, and where the participants are economically dependent, not on their individual efforts alone but on the success of the joint venture as a whole, the venture is a single enterprise under Section 1 of the Sherman Act.

III. WAIVER AND ESTOPPEL

Although respondent spends a substantial portion of his opposition brief arguing that the issues presented in the petition were not raised below and/or that petitioners should be estopped from appealing them, the Court can quickly dismiss these assertions. These same arguments were presented to and rejected by the court of appeals. Put simply, both the ancillary restraints doctrine and the

single enterprise argument were raised and decided in both the district court [10] and the court of appeals.[11]

Contrary to the implication in the opposition brief, the petition does not take issue with the jury instructions at trial. Rather, petitioner contends that the district court erred in denying the NFL's motions to dismiss and for summary judgment. Thus, respondent's allegations that petitioners did not raise issues *at trial* are beside the point; our point here is that no trial should have been held.[12]

Likewise, respondent's argument that the NFL should be estopped from raising the single enterprise argument is misplaced. (Opp. at 16-17.) Once the district court had dispositively ruled prior to trial in favor of respondent on this issue, the NFL was under no obligation to raise the issue again at trial. Indeed, the NFL's counsel specifically cited the district court's "ruling as a matter of law" on the

---

[10] The ancillary restraints argument was raised by the NFL both in its motion to dismiss and in a proposed jury instruction at trial. With respect to the single enterprise argument, in denying the NFL's motion to dismiss, the district held that, because *NASL* and *Raiders* "establish that agreements entered into between professional football owners" are "justiciable under [Section 1]," Sullivan had shown "an agreement among two or more persons or distinct business entities." *Sullivan* v. *Tagliabue*, 795 F. Supp. 56, 57 (D. Mass. 1992).

[11] The NFL raised both points in its opening appellate brief (*see* Brief of Defendants-Appellants at 28-40), and the First Circuit addresed both issues in its decision (*see* 34 F.3d at 1099, 1102-03; Pet. App. 10a-12a, 17a-19a).

[12] In any event, the NFL was not required to continue to object after the district court had ruled for respondent on an issue. *See United States* v. *Mejia-Alarcon*, 995 F.2d 982, 986 (10th Cir.) ("[r]equiring a party to renew an objection when the district court has issued a definitive ruling on a matter that can be fairly decided before trial [is] unnecessary"), *cert. denied*, 114 S. Ct. 334 (1993); *Calderon* v. *Witvoet*, 999 F.2d 1101, 1108 (7th Cir. 1993) (defendant is not required to raise issue after it is decided in court's summary judgment opinion).

single enterprise issue as the reason for not pressing the argument at that stage of the proceedings. (J.A. 1512.)

Finally, the court of appeals reached and decided both of the issues presented in the petition, and the Court is free to reach any issue decided by the appellate court below.

CONCLUSION

For the reasons stated in the petition and above, the Court should grant the petition for a writ of certiorari to the Court of Appeals for the First Circuit.

Respectfully submitted,

JOHN VANDERSTAR *
SONYA D. WINNER
THOMAS O. BARNETT
ETHAN M. POSNER

COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-5540
Attorneys for Petitioners

* Counsel of Record

FEBRUARY 1995